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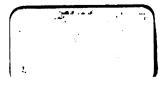
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REPORTS

CASES IN LAW AND EQUITY,

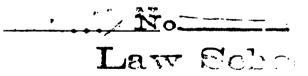
ARGUED AND DETERMINED

SUPREME COURT OF THE STATE OF GEORGIA,

FROM GAINESVILLE TERM 1855, TO ATLANTA TERM 1866, INCLUSIVE

THOS. R. R. COBB, Reporter.

VOL. XIX.



ATHENS, GA: OF TOP > REYNOLDS & CHOCINNATI CC...



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JUDGES OF THE SUPREME COURT.

HON. JOSEPH H. LUMPKIN, ATHENS.
HON. C. J. McDONALD, MARIETTA.
HON. HENRY L. BENNING, COLUMBUS.
THOS. R. R. OOBB, Reporter, ATHENS.
ROBERT E. MARTIN, Clerk, MILLEDGEVILLE.

JUDGES OF THE SUPERIOR COURTS, PRESIDING DURING THE PERIOD OF THESE REPORTS.

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Middle DistrictHon. WILLIAM W. HOLT,Augusta
Northern DistrictHon. THOMAS W. THOMAS, Elberton.
Western DistrictHon. JAMES JACKSONAthens.
Ocmulgee District, Hon. Robt. V. HARDEMAN, Clinton.
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Coweta DistrictHon. O. A. BullLaGrange.
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Southwestern DistrictHon. A. A. ALLEN Bainbridge.
Macon District
Blue Ridge DistrictHon. JOSEPH E. BROWNCanton.
Brunswick DistrictHon. A. E. CochranBrunswick.
Pataula DistrictHon. D. J. KIDDOOCuthbert.
Tallapoosa District,D, F. HAMMONDNewnan.

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TABLE OF CASES REPORTED IN THIS VOLUME.

ALPHABETICALLY ARRANGED.

•	_ · · · · · · · · · · · · · · · · · · ·
	Grosby es DeGraffenreid
Adams vs Dixon573	Cunningham vs Morris583
Adkins, Robinson vs398	Cureton, Feagan vs404
Adkins vs Thornton325	D D
Adkins, Thornton vs464	Davis, Hunter es413
	Davis, The C. R. R. & Bkg, Co. vz. 437
Anderson, Akin es229	DeGraffenreid, Crosby rs290
Anderson ra Sego501	Delorme, Pease vs220
Andrews rs Tinsley303	Denson va Patton
Armstrong, Powers vs427	Dinkins et al. White vs285
Arnold, Upson w 190	Dixon, Adams vs513
Askew vs Taylor 17	Pobbins, Holmes vs 629
Ault, White vs55	Dugas, Lawrence vs557
Austell, Holeomb w 604	Duke, The Mayor and Co. vs 93
В	Dunn, Fernander rs497
Baker, Wilcox & Co. vs Wimpee et al 80	Dunwoody et al. Smith ve237
Baker & Hart vs Napier and wife 520	E
Banks rs Gidrot & Co421	Earnest vs Napier and wife537
Bates, Rogers vs54?	Eason vs Wilcoxson565
Batty, Hargroves et al ve	Saton rs Yarborough 82
Beal, Jones rs171	Edinonson vs Jones 19
Behn & Foster, Phillips cz 298	Edmonson re White 534
Bond, Lynch ve314	Elam rs Lewis 608
Bradford, Merris es 527	Elam. Wyatt ra 335
Bowie re The State 1	Epps rs The State 102
Dowen & Bro. Rogers, &c. vs	ı r
Branch vs Riley161	Feagan vs Cureton404
Brown vs O'Barr, &c. and Todd 424	Fernander vs Dunn497
Bryan, Hansell vs	Few, Phinizy vs 66
Buntyne vs Stone 78	Fitts vs Rose
Burch vs Burch 174	Fleming vs Hammond145
Barnes vs Hill et al 22	Findlay vs Roberts163
Byrne vs Lowry 27	Formby vs Wood
C	Fort et al Rogers vs 94
Calloway as Jones 277	French, Rogers vs316
Cary and Stanford, Sample vs573	G
Chambers Noise 503	Gaines vs Wedgeworth 31
Chambers, Jeffers & Co. vs Sloan &	Gidrot & Co. Banks rs421
Hawking 85	Goddard, Johnson es
Claland at at us Waters and 25	Goodson Cooley
College of Staddard	Goodson, Cooley vs
Conyers vs Hamilton 76	TT TT
Cooper Mason was	H Haygood vs The Inferior Court 97
Cooper as White	Hamilton as Converse Court 97
Cooler Condens	Hamilton es Conyers
Continue of The Continue of th	Hammond, Fleming vs
Costley ve The State	Hansel, Bryan to167

TABLE OF CASES IN THIS VOLUME,

Arranged in the Order of their Decision, with a Note of the Questions of Lawconsidered in each.

AT GAINESVILLE-September Term, 1855.

1.	H. Bowie vs. The State. New Trial. Practice	1
2.	S. M. Watts et al. vs. B. M. Smith. Probate of	
	Deed. Color of Title. Alias Fi. Fa	8
8.	W. E. & G. T. Jackson vs. J. R. Stanford. Mort-	
	gage. Deed	15
4.	J. Askew vs. G. Taylor. New Trial	17
5.	J. Edmondson vs. M. D. Jones. Injunction	19
6.	D. M. Burns vs. L. Hill et al. Contracts of Infants.	
	Set-off	22
7.	T. Byrne vs. A. Lowry. Abandonment of Posses-	
	sion	27
8.	E. P. Gaines et al. vs. W. Wedgeworth et al. Amend-	
	ment of Confession	31
9.	C. Tompkins vs. N. J. Venable. Amendment of	
	Affidavit for Appeal	33
1 0.	W. C. Cleland et al. vs. T. J. Waters. Manumission	35
11.	F. Phinizy et al. vs. S. A. Few. Trusts. Devise	66
	J. M. Gregory vs. T. G. Waters. Liability Sheriff	71
	D. S. Printup vs. R. G. Johnson. Lien of Acceptor	73
	B. H. Conyers vs. T. Hamilton. Injunction.	
	Vendor and Vendee	76
15.	J. E. Buntyne vs. W. H. R. Stone. Probate of	
	Deed. Parties to Bill	78
16.	J. S. Eaton vs. N. Yarborough. New Promise	82
	Chambers, Jeffers & Co. vs. Sloan, Hawkins & Co.	
•	Affidavit for Attachment	84

18. Hooper & Mitchell vs. Memphis Br. R. R. Co. Attorney's Lien....

19. Baker, Wilcox & Co. vs.	W. Wimpee et al. Part-
nership. Assets	87
20. W. R. Smith vs. The City	Council of Rome. Right
of Way. Waste	89
21. The Mayor, &c. Rome vs.	D. D. Duke. <i>Error</i> 93
22. J. Rogers vs. W. A. Fort	
	94
23. The Governor ex rel. Hay	
_	97
24. John Epps vs. The State.	
	Former Recovery of Land 124
26. R. C. Park vs. Joseph H	
27. M. Hargroves et al. vs. I	
OF Trusting of Hooms S	chool vs. J. W. Robinson.
28. The Justices of Hearne S	chool vs. J. W. Robinson.
29. John Kerr, adm'r, vs. T.	
ecutors. Liability	
AT MILLEDGEVILLE	-November Term, 1855.
30. R. and C. Jordan vs. J.	W. Porterfield. Sheriff's
30. R. and C. Jordan vs. J. Liability	139
31. A. C. Matthews vs. W. P.	ass. Action on the Case 141
32. H. G. M. Fleming vs. A	Hammond. New Trial.
Common Carriers	
33. E. W. Roebuck vs. D. Tho	
84. H. G. Peterman vs. P.	Watkins. Irregularities.
84. H. G. Peterman vs. P. Title by Adm r	
35. E. Mattox vs. M. J. Brys	
36. E. Branch vs. Jno. Riley.	
37. R. Findlay vs. N. Roberts	
38. J. B. Fitts vs. J. P. Rose	•
39. A. H. Hansell vs. Beni. B	rvan. Evidence. Parol
39. A. H. Hansell vs. Benj. B	
40 T 36 T TO 4 TO	
40. J. M. Jones vs. Erastus E	Seall. Agency. Death of

41.	S. W. Burch et al. vs. J. C. Burch, ex'r. Executor	
	of Executor. Powers	174
42 .	of Executor. Powers S. Upson vs. N. C. Arnold, ex'r. Partnership and Separate Assets	190
4 3.	Pressly (a slave) vs. The State. Jurors. Charge	100
	of Court	199
	AT SAVANNAH—January Term, 1856.	
4 4.	The Central R. R. & Bk'g Co. vs. Hines, Perkins	
	& Co. Party to Record. Witness	203
4 5.	L. E. B. DeLorme vs. T. B. Pease. Bona Fide	
	Purchaser. LXXIV	220
4 6.	Akin, Guar. vs. Anderson, Guar. Descent among Free Negroes	229
47.	J. Smith vs. W. J. Dunwoody et al. Perpetuity.	
	Construction	237
4 8.	M. Phillips vs. J. Phillips. Vested Remainders	261
	22. 2 miles on or 2 22. por	
	AT MACON—January Term, 1855.	
4 9.	T. Swearingen vs. N. Swearingen. Temporary Al-	
	imony	265
5 0.	D. Porter vs. E. Pierce. Sheriff's Liability	268
	C. W. Horn vs. F. Thomas. Dissolution of Injunc-	
	•	270
52.	N. W. Collier et al. vs. E. Stoddard. Breach of	
	Sheriff's Bond	274
58.	Sheriff's Bond	
-	Jurisdiction	277
· 54.	S. Jones and another vs. P. E. Tarver. Judgments.	
	Error	279
55.	J. White vs. W. J. Dinkins et al. Practice. Trusts	
	and Trustees	285
56 .	J. P. Crosby vs. J. D. DeGraffenreid. Fraudulent	
	Sales	290
57.	L. Morrison vs. M. A. Hayes. Adverse and Con-	
	tinuous Possession	294

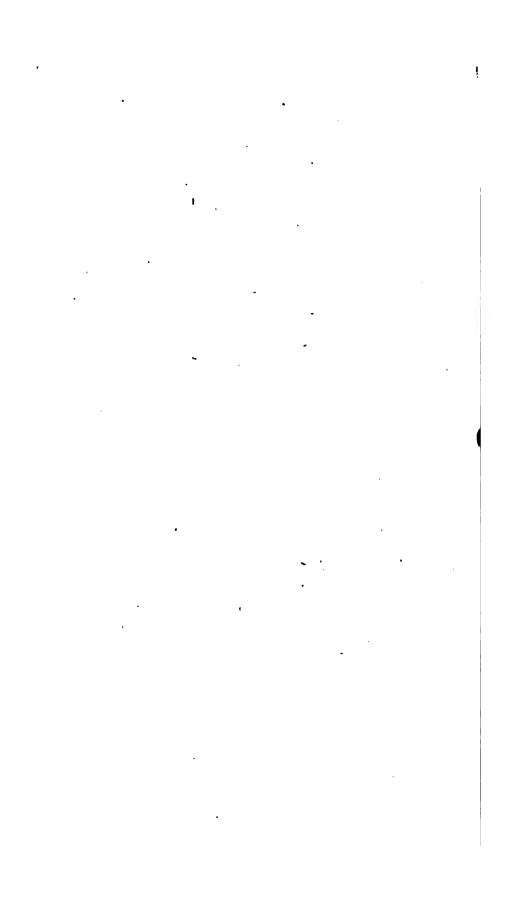
58. J. N. Phillips vs. Behn & Foster. Ve	rdict.	Pay-	
ment. Appeal		• • • • • •	298
59. G. Andrews vs. T. Tinsley. New Tri	al		303
60. C. A. Savage vs. J. Jackson. Deceit.		•••••	305
31. Harrison & Seward vs. Savage. Decei	it	•••••	310
62. W. Williams vs. E. Hollis. Use and			313
63. A. Lynch et al. vs. W. Bond et al.	Dismiss	sal of	
Claim	•••••	•••••	314
64. J. C. Rogers et al. vs. E. French. Legacy	Adempte	ion of	
Legacy		· · · · · · · ·	316
65. S. Adkins vs. D. Thornton. Liabil	lity of	Bank	
Stockholders			325
66. A. J. Miller, adm'r, vs. T. Surls. Ad	lver s e 1	08868-	001
sion		•••••	331
67. P. A. Wyatt vs. W. D. Elam. Error			885
68. A. J. Robinson vs. R. H. Lane. Liab Stockholders			007
69. A. J. Robinson vs. S. Adkins. Pract			
70. J. Williams vs. The State. Evidence			990
Cases	in Cri		402
71. W. H. Feagan vs. Cureton. Evidence.	Fran	dulent	402
71. W. H. Feagan vs. Cureton. Evidence. Assignments			404
72. N. Sledge vs. J. A. L. Lee. Suit of	n Attac	hment	
Bond	•••••	•••••	411
73. A. Hunter vs. J. Davis. Estoppel			
74. Coweta F. M. & Co. vs. C. Rogers. B	Breach o	f Con-	
tract. Damages	•• • • • • • •		417
tract. Damages	•••••	•	421
76. J. W. Brown vs. Roberts & Foote. 1	Process :	in In-	
ferior Court		• • • • • • • •	424
77. F. Kelly vs. The State. Criminal P			
78. V. Powers et al. vs. J. W. Armstron	ig. Co	nstitu-	
tional Law			
79. D. McDaniel vs. E. L. Strohecker.			
80. C. S. Reynolds vs. E. T. Jordan.	Attaci		
Replevy			436
81. Central R. R. & B'k'g Co. vs. R. Da	vis. Co	nmon	427

Title to Office...... 559

106. J. B. Wilcoxson vs. H. Eason. Inadequacy of

Vendor and Purchaser	569
109. J. A. Sample vs. Cary & Stanford. Appeal. Af-	
fdavit	578
110. P. H. Whitaker vs. N. Tompkins. Contract	
111. W. C. Denson vs. J. F. Patton. Separate Estate	
112. D. R. Mitchell vs. D.S. Printup. Recovery in Trover	
113. E. Formby vs. W. Wood. Appeal by Lunatic	
114. C. T. Cunningham vs. W. Morris. Recovery in	
Ejectment	58 3
115. J. J. Printup vs. D. R. Mitchell. Judgment.	
Continuance	586
116. W. Holcombe vs. G. W. Roberts. Slander	
117. L. J. Hillburn vs. R. O'Barr. Lien of Carpenter	
118. A. Thompson vs. J. R. Richards. Deed void un-	
, der 32 Henry VIII	594
119. Rogers, &c. vs. Bowen & Bros. Service	
120. H. V. Johnson, Gov. vs. J. B. Goddard. Amend-	
ment of Sci. Fa	597
121. C. Goodson et al. vs. B. Cooley. Partners. Con-	
	599
122. J. McCord vs. J. R. McCord. Marriage Contract	602
123. D. Holcomb vs. A. Austell. Adverse Possession	
124. S. C. Elam vs. W. A. Lewis. Ca. sa. vs. Attorney	608
125. The Inferior Court vs. M. S. Yoakum. Receiver's	
Commission on County Tax	611
126. C. Costley vs. The State. Criminal Law	
127. V. Holmes vs. M. G. Dobbins. Continuance. In-	
terrogatories	629





CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF THE STATE OF GEORGIA,

AT GAINESVILLE,

SEPTEMBER TERM, 1855.

Present—JOSEPH H. LUMPKIN, EBENEZER STARNES, HENRY L. BENNING.

No. 1.—HENRY BOWIE, plaintiff in error, vs. THE STATE OF GEORGIA.

- [1.] Matters not affecting the real merits of an indictment, are not sufficient to arrest the judgment on the indictment.
- [2.] The ground for the granting of a new trial ought, in general, to be something dehors the record.
- [3.] A motion for a new trial, was made on the following ground, among others, viz: that the Court charged the triors, that if the Juror had formed and expressed an opinion from rumor, he was incompetent. In the motion, it was assumed that the Court had made this charge; but in the bill of exceptions, there is nothing to show that the Court had made any charge at all to the triors; nor anything to show whether it was at the instance of the accused or of the State, that the Juror was put upon the triors: Held, that this ground is one on which a reviewing Court would not be authorized to grant a new trial.
- [4.] The mere omission, by the Court, to charge the Jury on a point, is not, in general, a ground on which a new trial may be demanded. The point YOL. XIX-1

ought, at least, to be such that the law on it is somewhat doubtful or abstruse.

[5.] When the weight of evidence is on the side of the verdict, a new trial will not be granted.

Murder, in Dade Superior Court. Tried before Judge TRIPPE, November Term, 1855.

A motion was made in arrest of judgment in this case, upon the following grounds:

1st. That no such Grand Jurors as William Hale, Soderick Hale and Stephen Austin, appeared to have been sworn—the nearest approach to these names being William G. Hale, S. B. Austin and Shadrick Hale.

2d. Because the minutes of the Court showed a true bill for murder, found against Henry Bowyer, but none against the prisoner.

3d. Because there was no sufficient minutes and records of the proceedings of said Court, as to finding of said bill—the only evidence of the signing of said minutes being the name of John H. Lumpkin, signed immediately under the names of Counsel to an agreement, without any entry as to the adjournment of the Court.

Also, a motion for a new trial upon the same grounds and also the following:

1st. Because the Court erred in charging the triors of the Jurors, that if the Juror had formed and expressed an opinion from rumor, he was an incompetent Juror.

2d. Because the Court failed to charge the Jury, that in considering of the admissions of defendant, as given in evidence by the State, it was their duty to consider of the whole admissions; and failed to charge the Jury at all upon this subject, although requested so to do by Counsel for prisoner, when addressing the Jury.

3d. Because there was no evidence upon which the Jury could find prisoner guilty—the only evidence that deceased was killed by prisoner being his own confession, coupled with the express declaration, that he did it in self-defence; and

there was no evidence contradicting that declaration or inconsistent with its truth.

4th. Because the Court did not sufficiently charge the Jury upon the nature and certainty of the evidence necessary to convict in criminal cases; the only charge of the Court upon this subject being, that Counsel for prisoner had insisted, in argument, that if they entertained reasonable doubts of defendant's guilt, it was their duty to acquit; that that was the law, but that it must be a reasonable doubt—not a mere conjecture—a bare possibility; that some men even pretended to doubt their existence; that it must not be a doubt of this sort; that he did not know that he could make it plainer than to say, it must be a reasonable doubt.

5th. Because Counsel for defendant offered to prove that deceased, when killed, had run away from Tennessee for some offence, and what that offence was, which was refused by the Court; the Court holding and declaring, that if prisoner's Counsel sought to show deceased a violent and blood-thirsty man, he would confine them to his general character as such.

The following testimony was offered in the case:

JAMES BATES being sworn, said: Some time last April was a year ago, in this county, witness was sent for and went down there; witness, his son and William Morgan. they got there, deceased was lying some twenty-four steps from prisoner's house, his feet down the hill; and some two hours after he arrived, saw wounds on the back part of his head; after examining, found skull broken; stove in in one place, the only fractured, some of his clothing lying beyond It was warm weather; his shoes and stockings were off; it was thirty minutes after one o'clock in daytime. Prisoner was sitting on his porch when witness got there, rather facing towards deceased; prisoner remarked, there lay the man; that he did it, and that he did it in self-defence. Learned from prisoner that his name was Tadlock. inquest, the Jury requested prisoner to state how the matter occurred; prisoner said deceased come to his, prisoner's, truck

patch; prisoner requested him to go away, and all that had passed should pass. After some conversation, deceased said he would go where he damned please. Deceased went towards prisoner's house and prisoner followed him; after they got there they had some conversation; deceased pulled out a pistol and told prisoner to shoot him, and that prisoner ought to shoot him; deceased then went in the direction of spring-house. Prisoner heard a pistol fire; prisoner thought deceased had shot at one of his horses in the lot: deceased also fired a pistol in prisoner's house, witness thinks after deceased fired out of doors; witness and others being just over the creek from prisoner's house, heard some three or four reports of pistol shots; there was nothing shot; he was partially behind the spring-house; at first he did not know but that he had killed one of his horses: afterwards, one of prisoner's children was out, and prisoner saw the child fall just as deceased fired; did not know but that the child was shot; but the child got up and was not shot; the pistol found lying by deceased was a revolver; one pistol had been fired in an adjoining room, in prisoner's house. Prisoner stated, that after the shooting he sent for witness and his son. shooting took place about eleven or twelve o'clock; witness went down. Prisoner's son that had been sent for witness staved so long, prisoner became uneasy and went in search of him; went to Mr. McBee's house, which is half way between prisoner's house and witness' house; witness lives some Prisoner said he found his son at Mr. McBee's, and returned home and found deceased lying at spring-house; found an axe which had been had at the washpot and knocked deceased on the head; witness had been introduced to deceased at prisoner's house, some time in November previous.

Witness says he did not know deceased's character for violence; saw no weapon but the pistol, and that was lying out by deceased. Prisoner had stated to witness, when at prisoner's house in November before, that he supposed Tadlock was the father of little Willie the grand-son of prisoner; who was an illegitimate child, and who was at his grand-fathers;

child Willies' mother was then dead; had been drowned a a few weeks previous. Prisoner had another daughter, single, grown and another nearly grown. Tadlock came there some six weeks after death of Willie's mother; when they went to deceased, as he lay at the spring, a flask was found lying by him, with some spirits in it; not quite half full; deceased lay from 25 to 28 steps from prisoner's porch; does not think it was exactly in the yard; rather behind the spring-house, but within the inclosure; prisoner had a large family of children. Mrs. Bowie was a feeble woman, and appeared to be in bad health; prisoner had character of being a peaceable, honest and industrious man.

JOHN SITTON: Deceased's name was Tadlock; had known him three years.

MARY McBee, sworn: Said prisoner came to Mr. McBee's; prisoner said deceased was drunk and asleep behind his spring-house, and he had come for advice which was given; prisoner said he would kill him, which he repeated several times; witness urged prisoner not to kill him; witness' mother advised tying him if he got unruly, and send for the neighbors. Prisoner said he felt like killing him.

DR. JAMES WORTHINGTON: That deceased died of the wounds; either wound was sufficient to have caused his death; does not know his character for violence; saw pistol lying near deceased. It was the only evidence of deceased carrying weapons.

The Court over-ruled the motion in arrest of judgment and the motion for a new trial, and these decisions are assigned as error.

WRIGHT, for plaintiff in error.

C. PEEPLES, representing Sol. Genl. for defendant.

By the Court.—Benning, J. delivering the opinion.

[1.] The grounds for the motion in arrest of judgment,

consisted of matters which did not affect "the real merits of the offence charged in the indictment." And such grounds are not good in arrest of judgment. (Code, 11 Div. 2 Sec.)

[2.] These same grounds were relied on in the motion for a new trial. But they are of a kind which is not appropriate to a new trial. They are not extrinsic: the matters in which they consist, are not "foreign to or dehors the record." (3 Black. Com. 387.) It is obvious that such matters as these are, do not lie within the province of the Jury.

Another of the grounds contained in the motion for a new trial was, that the Court charged the triors, that if the Juror had formed and expressed an opinion from rumor, he was incompetent.

But the bill of exceptions fails to state what was the charge of the Court to the triors.

In the motion for a new trial, it is assumed that such was the charge; but even in that motion, it is not stated whether the Juror was put upon the triors by the accused or by the State. The charge, if given, was such that it could not operate otherwise than in favor of the party, which was the one objecting to the Juror. If, therefore, it was the accused that was that party, the charge, if wrong, operating as it did in his favor, if it operated at all, was not a thing of which he could take advantage.

[3.] Under these circumstances, it is impossible for this Court to be able to say whether this ground, even if good in law, was one on which a new trial should have been granted by the Court below.

The next of the grounds taken for a new trial was, that the Court failed to make any charge to the Jury, concerning "admissions."

[4.] The mere omission by the Court to give a charge on a particular point, is not, in general, a ground on which a new trial may be demanded. If the point be one about which the law is doubtful, or is abstruse, such an omission is, perhaps, a matter which gives a right to the losing party to call for a new trial. If it be not such a point, why should we

say that the Jury, a body which, indisputably in criminal cases, is made the judges of what the law is, did not follow the law? (Graham on N. Trials, 273.)

Even the New Trial Act of 1854, does not make the mere omission to give a charge a ground for a new trial. (Acts of 1854, 46-7.)

And the rule, that in considering a person's admissions, all of the admissions are to be taken together, is one so obvious, that a Jury would, of themselves, it is to be presumed, follow it.

[5.] The next ground taken in the motion for a new trial was, that there was no evidence on which the Jury could find the defendant guilty. But we think there was evidence on which the Jury could find him guilty. We think the weight of the evidence is on the side of the verdict.

The next ground taken in the motion was, that the Court did not sufficiently charge the Jury, upon the nature and certainty of the evidence necessary to convict in criminal cases.

We cannot see any error in the charge of the Court on this point.

The next and last ground was, that the Court had refused to let the accused prove that the deceased, when killed, was a fugitive from Tennessee for an offence, and what the offence was.

No case, as far as we know, has gone the length of deciding, that evidence of such facts as those, is admissible for the purpose of showing a homicide to have been justifiable. The case of Monroe vs. The State, (5 Ga. R.) certainly has not. If the crime of which the slayer offers to prove the person slain to have been guilty, is such that from its very nature it may stand as one among those "circumstances" which the law considers "sufficient to excite the fears of a reasonable man," then, perhaps, evidence that the person slain was guilty of it is admissible; but in this case, the bill of exceptions fails to tell us what was the crime of which the accused offered to prove the deceased to have been guilty.

We, therefore, cannot say that the Court below was wrong

in refusing to let, the accused make the proof which he proposed to make.

The result is, that we think the Court below did right in over-ruling both motions.

No. 2.—Samuel M. Walls et al. plaintiffs in error, vs. Benjamin M. Smith et al. defendants.

- [1.] A deed was witnessed by two persons, one being a Justice of the Peace. In the clause of attestation, there was no certificate of delivery: Held, that inasmuch as the official signature of the Justice was received in lieu of an affidavit by a witness, that the deed was signed, sealed and delivered before admitted to record; and the same being found on record; by virtue of the maxim, "that things are held to be legally and properly in their existing state until the contrary is shown," the deed should be held to be legally and properly on the record, by due proof of signing, sealing and delivery, until the contrary is shown.
- [2.] A simple indorsement of "alias fi. fa." upon an execution which, in all other respects, purports to be an original, does not make the process an alias fi. fa.; but the indorsement will be controlled by the body of the instrument.
- [3.] A fi. fa. with entries of levies thereon, in which a tract of land is described; and which is by one of said entries returned as sold by the Sheriff, and purchased by one under whom defendants claim, may be admitted as color of title. Color of title is anything in writing connected with title to land, which serves to define the limits of the claim.
- [4.] A deed which is commenced by one Sheriff and left unfinished, and afterwards completed by his successor, can operate as color of title only from the date of its completion.
- [5.] Color of title can be of service only in aid of possession; and possession thus aided, can be matured into title to the extent to which it is intended to gain possession.

Ejectment, in Whitfield Superior Court. Tried before Judge TRIPPE, April Term, 1855.

This action was brought in February, 1852, to recover lot

No. 283, 9th district, 3d section. The defendant relied on the Statute of Limitations.

The following points arose on the trial: A deed being tendered by the plaintiff from David B. Tarvin to himself, it was objected to on the ground that it no where purported to have been delivered. The Court over-ruled the objection, holding that the possession of the deed by plaintiff presumed a delivery; and on this decision error is assigned.

The defendant proved that John Bishop was in possession of the land in 1844, and continued therein until the defendant came into possession, who kept it until this suit was brought. A lease was produced from James Morris to Bishop, dated 14th Nov. 1844, letting 25 acres of the land.

Defendant then introduced a fi. fa. in favor of Chastain & Luck against David B. Tarvin, upon which was entered a levy upon the land in dispute, dated 25th of April, 1843; and then the following entries: "Disposed of the above levy by selling the lot of land on the 6th of June, for thirty-one dollars, June the;" and on the paper attached was the following: "Disposed of the levy on lot No. 283, 9th district, 3d section, by selling to James Morris, on the first Tuesday in March, 1844, for thirteen dollars and twenty-five cents. This 5th day of March, 1844.

"C. W. BOND, Sheriff."

This paper was offered as color of title. Plaintiff objected to it, on the ground that it appeared to be an alias fi. fa.; and no order of Court was shown authorizing an alias to issue. The Court sustained the objection and defendant excepted.

Defendant then introduced Charles W. Bond, the former Sheriff, who testified that he had sold the land to Morris, in March, 1844, and had received the money; that he had begun to write a deed, but being interrupted, he left it unfinished, and never finished it.

Defendant then introduced a deed to the land from R. S. Hancock, Sheriff, dated 2d Sept. 1846, reciting that Bond

had offered the land for sale, as Sheriff, and that Morris became the purchaser. Bond testified that this was the same paper which he had left unfinished, now finished and signed by his successor.

Defendant showed that he had purchased Bishop's lease,. by which he held under Morris.

The Court held, and so charged the Jury, that the Sheriff's deed, made by Hancock, could not operate as color of title, except from its date; that, therefore, there was no color of title earlier than 1846, except the lease, which could only support a claim to the 25 acres embraced in it; and that the purchase by Morris, and payment of the money, in 1844, could not support the Statute of Limitations. The Jury found for plaintiffs.

To this charge and the other decisions of the Court, the defendants excepted, and assigned sundry grounds of error thereon.

HULL; AKIN, for plaintiffs in error.

WRIGHT; HUTCHINS, for defendants in error.

By the Court.—STARNES, J. delivering the opinion.

[1.] An objection was made to the deed from Tarvin to Smith, because there was no evidence of delivery in the certificate of attestation.

This deed is attested by two witnesses, one of whom was a Justice of the Peace. The attestation by a Justice is received in lieu of the affidavit of a subscribing witness. Being on the record thus, in the "official attestation," (to use the language of the Act of 1827,) of an officer appointed by law, to attest the due and proper execution of such an instrument, and to make such certificate thereof as would admit the paper to record after the same was executed before him, one of the leading maxims of presumptive evidence applies, viz: that "things are held to be legally and properly in their

existing state, until the contrary is shown." That is to to say, under such circumstances, the deed will be held to be legally and properly on the record by due proof of signing, sealing and delivery, until the contrary is shown. This presumption is strengthened in this case by the fact, that the deed comes from the custody of the grantee.

[2.] The next point made was, that a f. fa. tendered in evidence was an alias f. fa.; and that before it should have been admitted, an order of the Court, authorizing its issue, should have been shown.

This is not an alias fi. fa. in any proper, legal and technical sense of the term, whether such a fi. fa. be considered as a process issuing into different counties, or a second fi. fa. issuing after the first has been returned. According to our practice, we do not issue such fi. fas. And it is not pretended that this is any thing more than an established copy of a lost original. The entry indorsed of "alias fi. fa." could not, then, have been intended to mean more than this. have we the right to attribute this to it as its legal significa-The record does not authorize it. As this paper comes to us, it is in the form of an original fi. fa. It is signed by the Clerk, as such instruments are; and so far, it is regu-But we know not by whom the indorselar and valid. ment is made. That entry is in no wise authenticated by the Clerk or other officer. Shall it be allowed to control the undoubted official act of the Clerk? As a reason why it should not, take this illustration: Suppose, that in the face of the f. fa. the amount recovered was stated to be one hundred and twenty-seven dollars and thirty-three cents, instead of one hundred and thirty-seven dollars and thirty-three cents, the amount indorsed upon the process. The writing in the body of the instrument, would of course, control as to the amount.

It will be remembered that the objection here was to the fi. fa. as it was presented. We will not say, but that if it had been made to appear, by some undoubted and authentic feature of evidence, that the same was a copy, but that an order of the Court should have been required. As it

stands, however, the indorsement, alias fi. fa. is simply surplusage, so far as legal effect is concerned.

[3.] After the fi. fa. was rejected, the defendants offered an entry, signed by the Sheriff, and attached to the fi. fa. which purported to be a levy on lot 283, in 9th district, 3d section of Cherokee Lottery, and a return and disposition of the subject of levy, by selling the same on the 5th day of March, 1844, to James Morris, for thirteen dollars and twenty-five cents. We think that these entries should have been admitted as color of title, together with the fi. fa. Together they would have served to define the claim. And color of title is any thing in writing, connected with the title, which thus serves to define the extent of the claim. (Bank vs. Smyres, 2 Strob. 29. Beverly and another vs. Burke, 14 Geo. 72.)

Failing in getting these entries before the Jury, the Counsel for defendants asked the Court to charge that the purchase of said lot, by Morris, and the payment of the purchase money, taken in connection with the possession of Bishop and Walls, would constitute color of title. This the Court refused.

It cannot be doubted, that the purchase of the lot and payment of the purchase money, in the absence of a better title, would constitute a title to the land, which could be enforced in a Court of Justice. But it was offered here as color of title in aid of possession.

If such color of title is not evinced by the unwritten facts of purchase and payment, we think that it may be by written entries which show these things in connection with a given or specified lot of land. And we have said that such entries, in this case, might have been used, together with the fi. fa. in aid of possession. The character of this possession we will presently consider.

[4.] We think the Court was right in charging that the deed of Hancock, as Sheriff, took effect, certainly, as to third persons, when used as color of title only, from its date. Of course, whilst the deed was in an unfinished state, it could

not properly be said to be legal notice of anything. And it was so unfinished, though it had been partially written by the former Sheriff, until the day of its date.

But the Court charged that there was an entire absence of paper title until the execution of the deed by Hancock, set up as color of title, except the instrument which was called a lease; and that that operated as color of title only to the extent of the amount of land therein described.

[5.] While we differ from His Honor, Judge TRIPPE, in the opinion that the entries on the fi. fa. may not be used to show color of title, and whilst we doubt that what is called the lease can be so regarded, not being signed by Morris; yet, we so far agree with him, as to hold that such evidence as there is, of color of title, is only supported by evidence of a possession of the twenty-five acres referred to in the lease.

It is true, that a landlord settling a tenant on his patent with an intent to gain possession, (giving his tenant no bounds,) is, ipso facto, in possession to the limits of his patent. (Lee vs. McDaniel, 1 A. K. Marsh, 234.) And if one be living on land, his possession is not restricted to the house in which he resides, but extends over all that he claims with color of title. And the rule applies where the possession is by a tenant. (Johnson vs. McMillan, 1 Strob. 143.) But in this case, the claim which is supported by color of title, was only an intention to possess to the limits of the twenty-five acres; and the possession, therefore, can be carried no further, according to the case before us.

Let the judgment be reversed.

Jackson vs. Stanford.

No. 3.—W. E. & G. T. Jackson, plaintiffs in error, vs. John R. Stanford, defendant.

- [1.] A third person, who is not a party to the record, will not be permitted to make objections to the foreclosure of a mortgage, under our Statute.
- [2.] The fact that a deed purports to be made by two persons, and one only executes it, does not make the instrument void per se.
- [3.] If real property is conveyed to and held by a firm, the members of the firm are tenants in common, and either party can convey his undivided interest in the subject.

Motion, in Habersham Superior Court. Decided by Judge Jackson, April Term, 1856.

For the facts in this case, see the judgment of the Court.

AKERMAN, for plaintiffs in error.

COBB & HULL, for defendant in error.

By the Court.—LUMPKIN, J. delivering the opinion.

William E. & George T. Jackson, partners, under the name of W. E. & G. T. Jackson, applied, in the Superior Court of Habersham County, for the foreclosure of a mortgage on lot No. 150, in the 10th district of that county. The mortgage purported to have been given by Elingo H. Ramsey and Seth S. Ramsey, but was, in fact, executed by Seth S. Ramsey only. The mortgagor made no objection to the proceeding. John R. Stanford appeared in Court and objected to the rule being made absolute, upon the ground that he had purchased the property at Sheriff's sale; and he produced a deed to that effect.

Counsel for the mortgagees objected to Col. Stanford's being heard in the cause; but the Court over-ruled the objection and permitted him to be made a party and file his objections. To which decision Mr. Akerman, in behalf of the Messrs. Jacksons, excepted.

Jackson vs. Stanford.

Col. Stanford, for himself, then insisted that the mortgage was void, inasmuch as it purported to be made by both of the Ramseys, and was executed by one of them only. And the Court, sustaining this objection, pronounced the instrument a nullity, and refused the rule absolute on that ground. And plaintiffs again, by their Counsel, excepted.

[1.] It is true that the case of McDougald against Hall, (3 Kelly, 174,) does not exactly decide this point; and yet, we think it substantially covers it. There, as here, an application was made to foreclose a mortgage on land. There as here, the rule nisi was granted and duly served on the mortgagor. And there, McDougald resisted the proceeding as Stanford does here, alleging his objections, in writing, that he was the owner of a part of the land. There were several other objections, says the report of the case, made by McDougald, which would have been good pleas if they had been interposed by the mortgagor.

But the Circuit Court over-ruled the objections, "deciding that McDougald was a stranger to the suit, not being a party thereto, and that he had no right to interfere, to prevent the rule absolute." And the judgment was affirmed by this And Judge WARNER, in writing out the opinion, says: "If McDougald has such rights and interests in the mortgaged property as is suggested by Counsel, we do not see in what manner they are to be prejudiced by the foreclosure of the mortgage as between other parties. When the judgment of foreclosure had between the parties to the record in this case shall be made to operate on his interests, he will have ample opportunity to assert them. The judgment of foreclosure between the mortgagor and mortgagees, will not foreclose any rights which McDougald may have to the mortgaged property, unless he claims title under the mortgagors."

And so we say to Col. Stanford in this case. This is a statutory remedy; a proceeding at Law; and to it no other parties are known in serving the requisite notice or for any other purpose, but the mortgagor and mortgagees. And we can readily see how this premature and unauthorized inter-

Jackson vs. Stanford.

ference by third persons, whose rights are not before the Court, would embarrass the proceeding. Sufficient unto the day is the evil thereof. When the mortgage execution is sought to be enforced against the land, Col. Stanford may interpose his claim, provided he can do so. And then, and not before, should he be heard. Should his claim prove frivolous and intended for delay only, the plaintiffs will be entitled to be remunerated in damages, which they cannot be under this novel procedure that is attempted to be engrafted upon the practice of the Courts.

It is said in argument, that unless third persons are allowed to come in and interplead in this way, they may lose an advantage of which they could not, perhaps, avail themselves at a future stage of the proceeding. All we have to say is, that the mortgagee gains no right which does not legitimately belong to him, and the volunteer loses none which does.

- [2.] But why is this not a good deed, as against the party that executed it? Conceding that the two Ramseys were jointly interested in this land, cannot either of them create a lien to the extent of the title or interest he holds? Partners may convey their undivided interest in real estate. The members of the firm are tenants in common as to the real property owned by the firm; and any one of them can convey his undivided interest in the premises. Anderson vs. Tompkins, (1 Brock. Cir. R. 456, 463.)
- [3.] That the form of this instrument may be suggestive of the fact that it never was finally executed, and might be relied on as evidence to support a plea, by the proper party, to that effect, I can readily understand; but that it should render the deed absolutely void, cannot be maintained. Had the grantor, instead of signing his own name, have sealed and affixed the firm name to the deed; still, it would have conveyed his individual interest, whatever that might be.

Askew et al. vs. Taylor.

No. 4.—IRVIN ASKEW et al. plaintiffs in error, vs. Green-BERRY TAYLOR, defendant in error.

[1.] It is no ground for the granting of a new trial, that the verdict is according to the weight of the evidence.

Ejectment and motion for a new trial, in Walker Superior Court. Decision by Judge TRIPPE, May Term, 1854.

The lessee of Irvin Askew and others, brought ejectment against Greenberry Taylor, for a lot of land in Walker County. The defendant relied on the Statute of Limitations. The writ was filed in office 3d March, 1849.

Defendant proved by James H. Clarkson: That Jonathan Davis, (under whom he claimed,) "about the last of February or 1st March, 1842," went into possession of the lot. Also, by John Mahan: That Davis went into possession "the latter part of the winter or early in the spring of 1842." Also, by Emory Hancock: That Stephen Caudle left possession in the fall of 1841, and Davis went in "a short time thereafter."

Plaintiffs proved by ELIZABETH CAUDLE: That Jonathan Davis moved upon the land "about the last of April, 1842." Also, by CLEAVLAND CAUDLE: That Davis went into possession "in the year 1842, between the 1st and 15th of April." Also, by RICHMOND CAUDLE: That Davis went in "between 1st and 15th April, 1842."

The Jury found a verdict for the plaintiffs; whereupon, the Court, on motion, granted a new trial, on the ground that the verdict was contrary to the weight of evidence. This decision is assigned as error.

WRIGHT, for plaintiffs in error.

T. W. ALEXANDER, for defendant in error.

VOL. XIX-3

Askew et al. vs. Taylor.

By the Court.—Benning, J. delivering the opinion.

[1.] The lot of land sued for in this case, was, it appears, granted to Irvin Askew, one of the lessors of the plaintiff.

The plaintiff read in evidence the grant to Askew, and proved the possession to have been in Davis, and closed his case.

The defendant traced his title through several persons, and among them, Stephen Caudle, up to Henry Murry. But he showed no title from Askew, the drawer, to Henry Murry.

This being so, the Statute of Limitations, of necessity, became the sole thing on which the defendant could rely for his defence.

And the question, whether he had been in possession long enough to be within the protection of that Statute, was one on which the evidence was conflicting.

Clarkson, one of the defendant's witnesses, swore to what amounted to this: that the defendant had been in possession "about" seven years before the commencement of the suit. The defendant had two other witnesses on this point, but neither of them swore to as much as Clarkson did.

On the other hand, the plaintiff proved by three witnesses, positively and distinctly, that the possession of the defendant did not commence until a time which was within seven years before the commencement of the suit. And he had the testimony of a fourth witness, Benjamin W. Caudle, which was almost as strong as that of those three.

There was, then, as to this point, a decided preponderance in the evidence against the defendant.

And the verdict was against him. The verdict, therefore, so far from being "decidedly and strongly against the weight of evidence," was in accordance with the "weight" of evidence.

This being so, it was an error in the Court below to grant a new trial; for there is no rule of law which authorizes a Court to grant a new trial, because the Jury have rendered Edmondson es. Jones and another.

-a verdict according to the weight of the evidence. The New Trial Act of 1854, does not go this length.

No. 5.—James Edmondson, plaintiff in error, vs. Malcolm D. Jones and another, defendants in error.

[1.] In a bill filed to rectify a written agreement, an injunction appendent thereto, will not be retained when the answer positively denies every allegation outside of the agreement, and there is no equity springing out of the contract as drawn.

Motion to dissolve Injunction. Decided by Judge TRIPPE, at Chambers, March 30th, 1850.

Malcolm D. Jones recovered a judgment against James Edmondson and others, as sureties, for \$2100. Edmondson was about to appeal, with a view to enter his defence, that the consideration of the notes was the purchase of a lot of land, and that Jones had failed to produce a perfect title, when the following agreement was entered into:

"It is agreed between the parties, plaintiff and defendant, that this judgment be stayed until the 1st day of next August, and if one half of the principal and interest be paid on or before that date, that the other half of the principal and interest be stayed until the first day of February next; otherwise, the execution is to issue for the whole amount of principal and interest and cost, on the first day of August next; and it is further agreed, that if a full chain of title is not produced to the defendant, James Edmondson, to the property for which the notes were given, which are the foundation of the judgment, that the said Edmondson is not barred from any legal or equitable right to compel the payees of said notes to procure a full chain of title to said Edmondson." This

Edmondson vs. Jones and another.

agreement was signed by Alexander and Trammell, as plaintiff's Attorneys, and by the defendants, personally. The first instalment was paid. The second was not, and execution was issued for the balance.

Edmondson filed a bill, charging the foregoing facts; and farther, that it was the understanding that Edmondson was not to pay the whole of the money until he should get a complete chain of title; and if he did not get it, he was to be placed back in the position he was in the Superior Court, which understanding Mr. Trammell was to have included in this written agreement; that no such chain of title had been presented to him, though he had repeatedly offered to pay, if perfect titles were made to him; that he had sold off portions of the land, and valuable improvements had been made thereon; that the residence of the payees in the note he did not know precisely, and he never would have given up his right of appeal had he not supposed the agreement protected him. The prayer was for an injunction until titles were made.

The answer of Malcolm D. Jones denied, positively, any agreement or promise to make a perfect chain of title, but insisted that complainant, when he purchased, knew of the absence of one link in the chain; that he made and delivered to complainant a warranty deed to the land, and is able to respond to any breach of the warranty; that complainant had no defence whatever to the said notes, and if he had appealed it would have been simply for delay; that he knows nothing of the agreement between him and Mr. Trammell, and denied Mr. T's authority to make any such agreement. He denied all the other facts charged in the bill, as to the understanding, &c. and insisted that he had fully complied with every agreement made.

The answer of Trammell denied all agreements or understanding outside of the written agreement, and insisted that the writing fully expressed the intention of the parties.

Upon the coming in of the answers, the Court dissolved the injunction, and this decision is assigned as error. Edmondson vs. Jones and another.

WRIGHT, for plaintiff in error.

UNDERWOOD, represented by Hull, for defendants in error.

By the Court.—LUMPKIN, J. delivering the opinion.

[1.] Was the Court right in dissolving the injunction in this case?

The answer to this question depends entirely upon the construction to be put upon the agreement between Mr. Trammell, as Counsel for Malcolm D. Jones, and James Edmondson, the complainant in the bill and the defendant in the Court below; for every allegation as to any stipulation not contained in the writing, is positively denied by the answer of both defendants; and especially by Trammel, who, as the Attorney of Jones, is charged to have made the agreement.

Does the instrument itself, then, make the production of a complete chain of title a condition precedent to the payment of the judgment? It speaks for itself. It is not even insisted that it does. It only says, that if this complete chain of title is not forthcoming, that Edmondson shall not be barred of any right, legal or equitable, which he may have to coerce Mr. Jones to produce this chain. That right he is now seeking to enforce.

But we see no error in dissolving the injunction in the meantime, especially as it is not pretended that Jones is not abundantly able to respond to any decree which may be rendered against him upon the final hearing of the bill. If the fact set forth in the answer, as to the knowledge of Edmondson of the defect in the title before he purchased, and his taking a warranty deed to protect him against it, be sustained by the proof, it will be difficult for the complainant to get relief, making no offer to rescind the contract, and there being no eviction, actual or threatened. Is he entitled to any?

No. 6.—DAVID M. BURNS, plaintiff in error, vs. Lucy HILL, et al. defendants in error.

- [1.] An infant may commit a fraud for which he can be made answerable civiliter. But it cannot be said to be an act of legal fraud for infants to repudiate an agreement which is not binding on them in law because of their infancy.
- [12.] This view is aided by the fact, that there is nothing in the record which shows, that when the infants made the agreement by which it is sought to bind them, they had any knowledge of their rights in the premises.
- [3.] The fact that the parents of such infants were in straightened circumstances, and that the infants may have parted with certain property, for the purpose of procuring a home for their parents and themselves, does not constitute a sufficient consideration for an agreement by which such property was to be taken for their father's debts; for maintenance is due from the parent to the infant, and not from the latter to the former.
- [4.] There must be a consideration to sustain every contract.
- [5.] A bill will not be maintained to secure a discovery, where such discovery would be useless.
- [6.] An equitable off-set will be allowed, although the amount be small, and although the party may have a remedy at Common Law, if to recover that small amount he be driven to many suits and to much trouble and expense.

In Equity, in Jackson Superior Court. Decision on demurrer, by Judge Jackson, August Term, 1855.

David M. Burns filed his bill, alleging that, about the year 1821 he loaned to Lewis Pyron \$950 and took a mortgage on two negroes, Violet and Tobe; that this money was borrowed to pay off the debts of Pyron, and secure a home for his family; that, subsequently, hearing that there was some difficulty about the title of Pyron to the slaves, he went to Pyron and inquired of him and his family, consisting of his wife and children, (all of the latter being of an age to understand the import of the transaction, except one,) and they all informed him that there was no such difficulty, or any claim whatever; that, then, in the presence of all of them, and with their full consent, he purchased the negroes from Pyron, and took a bill of sale, signed by him, and also by

A. L. Hill, (the husband of Lucy, the oldest daughter,) and by Sarah Pyron, the second daughter, who also represented herself to be of age; that at the same time he took a bond from the same persons, obligating themselves that the younger children, as soon as they arrived at age, should release to him all and every claim, whatsoever, to the negroes; that, subsequently, Pyron moved to Tennessee and there died, possessed of a small estate worth \$100: that his debts amounted to \$39, and the remainder (\$61) was distributed to his children; that Mrs. Pyron subsequently died, and the children claiming an interest in remainder in these slaves, have commenced an action of trover against Burns to recover The bill alleges that the "above stated facts these negroes. are known to the plaintiffs, and complainant can only fully prove them by resorting to their consciences." The prayer was for an injunction and an accounting for the sixty-one dollars, for the breach of warranty in the bill of sale of Pyron, in the event of a recovery by the children.

On demurrer, for want of equity and an adequate remedy at law, the Court dismissed the bill. This decision is assigned as error.

PEEPLES; HILLYER; COBB & HULL, for plaintiffs in error.

T. R. R. Cobb, for defendants in error.

By the Court.—STARNES, J. delivering the opinion.

[1.] There were two classes of persons concerned in the making of the contract, as it is alleged by the plaintiff in error. First, there were the infant children of Lewis Pyron. Secondly, the adults, consisting of Pyron, his son-in-law, A. L. Hill, and his daughter, Sarah Pyron.

The charges in the bill are those of fraud in the transaction set forth, shared by all these persons, and of user and enjoyment by them, of the money paid to Pyron by General Burns, for the land.

Let us first consider the interests of the infants.

Did their conduct constitute fraud? Undoubtedly an infant may be a tort feaser—may commit a fraud for which he can be made answerable civiliter. Was there such fraudhere? The alleged grounds of fraud are, that they consented to the contract of purchase—induced the complainant in this bill to believe that it was a good and binding contract on them—took the benefit of it—used and enjoyed its fruits, and now repudiate it. This is the full effect of what the bill charges.

Now admitting that these infants did receive a consideration for the consent which they gave to the sale of the negroes, by enjoying the proceeds of such sale, and that they afterwards repudiated their agreement to stand by their consent, we think that this does not amount to legal fraud, on their part; that it cannot correctly be said to have been an act of legal fraud for them to repudiate an agreement which was not binding on them in law. If they were infants, they could not be made answerable directly for such a contract. If not directly answerable, they cannot be made so indirectly.

- [2.] Besides, there is nothing in the record which shows that they had any correct knowledge of the rights which they had in the premises. True it is, according to the bill, that they were of a sufficient age to understand the import of the transaction; but it does not appear that they were of an age to have the custody of their own papers and titles, and thus to be informed of their rights. And there is nothing stated, going to show that they acted with a full and accurate knowledge of their rights.
- [3.] For the sake of the proposition just submitted, we have admitted that a consideration moved to these infants for the consent which they gave to the purchase of this land. But is this admission justified by the facts?

It was argued, that inasmuch as the parents were in straightened circumstances, and the children were possessed of some property, they might very properly have parted with the same for the sake of the land and home for which the money

of Gen. Burns was paid by their father. We learn, however, in our elementary lessons, that parents are legally and in duty bound to maintain their infant children. The maintenance, then, which these children received, was their due; and they were under no legal obligation to pay for it.

It would be a very dangerous and unprecedented rule which, by such a transaction as is here set forth, would allow infant children, while yet inexperienced, unacquainted with their rights, and under the influence of their parents, to bind property settled upon them and render it liable for a father's debts, so as to deprive themselves of an interest in remainder in the same.

[4.] There is another reason why these infants are not liable on the contract for want of consideration, which applies as well to the other children. We will therefore proceed to notice the interests of A. L. Hill and wife, and Sarah Pyron.

It may be assumed that the bill shows that these two daughters were of age and capable of binding themselves by the contract which it is alleged was made with Burns in 1824, though this does not clearly appear. Still, we find a difficulty in sustaining the bill against them; for it is our opinion that this bill does not show any consideration whatever for the contract which it is said these persons are endeavoring fraudulently to repudiate.

If the allegations be examined, it will be found that the complainant, in effect, only alleges, that these persons, being of age, consented to the sale of the slaves, solicited the complainant to purchase, assured him that no difficulty existed as to the title; and to prevail on him to make the purchase, executed a bond of indemnity in his favor. Now if all this be admitted, what did Gen. Burns lose by such conduct; and what did these persons, or the infants in question, gain by it? If he did not lose by it and they did not gain, surely there was no fraud in their conduct. His mortgage was on the slaves, and he could sell nothing but the slaves by it. He got them without a foreclosure and sale under it; and so, got

Did he forbear to all his mortgage could have given him. sue and put his debt into judgment by reason that the slaves were thus given up to him? If he had done so, forbearance to sue would have constituted a sufficient consideration. perhaps. But this is not alleged. The nearest approximation to it are the allegations, "that said purchase was made by him after and upon full consideration had by and amongst all the said family, who determined that by so doing; that is, by making said sale, was the only way which they could secure a home, as without this their land and other property would have to be sold, and would not more than have paid their debts," &c. This is altegether too vague and indefi-How was this the only way in which they could have He does not show. What is meant by the secured a home? allegation, that "without this their land would have Been Sold how, and by whom? It does not appear. Such loose allegations are not issuable, and cannot be received as definite statements.

For all that appears in the bill, there may have been executions against Pyron to a larger amount than the value of his property, and a suit by the complainant would have proved fruitless. If it were otherwise, however, and the complainant did forbear to sue, as a consideration for the consent alleged to have been given, this should have been distinctly alleged. In the above considerations, we have left out of view the coverture of Mrs. Lucy Hill, one of the children of Pyron, and one of the alleged contracting parties.

[5.] It was insisted that this bill should be maintained, if it were only for purposes of discovery.

The views which we submit, of course show that discovery would be useless; and the bill cannot be sustained on that ground, unless it be as to the equitable off-set which is pleaded; but that off-set does present a claim, small and insignificant as it is, which must give to the complainant's bill a stand-point in Court as it is, if he desire it.

[6.] We think there are sound, equitable reasons why the complainant should be permitted to press that claim, if he

wish to do so in this way. Small as it is, it is his right. If he lose these slaves by reason of the suit instituted by these distributees, who have received their portions of Lewis Pyron's estate, he should be allowed to collect it out of them. A suit at law may be maintained against them; but it is plain that this will be attended with trouble, expense and multiplicity of suits. All these Equity abhors. The amount due by each will be small, not exceeding the jurisdiction of a Justice of the Peace in Georgia. If he be compelled to sue and pay Attorney's fees in these cases, a small sum (if any thing) will be left to him. He should, therefore, be permitted to maintain his set-off.

Let the judgment be reversed on this ground.

No. 7.—Thomas Byrne, plaintiff in error, vs. Amos Lowry, defendant in error.

[1.] A took possession of the land of B, and kept possession for a while. H then left the land, with the intention of returning to it the next year and resuming possession, and went to his home, which was in another county, and resided there until near the end of the next year, when he returned to the land and resumed possession of it: Held, that during the time of his absence from the land, the Statute of Limitations did not run in his favor, and that it only began to run in his favor at the time when he returned to the land.

Ejectment, in Cobb Superior Court. Tried before Judge TRIPPE, March Term, 1855.

An action of ejectment was brought by Thomas Byrne, against Amos Lowry. Defendant relied upon the Statute of Limitations. The process was dated 24th July, 1849. The proof was, that one Isaac G. Albritton, who lived in Frank-

lin County, in 1841, came out to the land and cut house-logs, and then returned home, and in the latter part of the year 1842, he came back and put the logs up and lived there. Albritton sold to Lowry, who went into possession and continued so ever since. Albritton cut the logs in full view of the road, and about one hundred and fifty yards from the road. Much other testimony was introduced, not relevant to the question decided in this Court.

Upon the question of "continuity of possession" in Albritton, the Judge below charged, that the Jury must be satisfied, from the evidence, that the possession of the defendant and those under whom he claimed, was not only adverse and uninterrupted, but also continuous; that it is not necessary that the defendant and those under whom he claims, should be every day, or week, or month, upon the land, to constitute continuous possession; and by way of illustration, the Court observed to the Jury, if a farmer were to sow a field in wheat and reap it at harvest, and take off the wheat, and exercise no other acts of possession of the field, not even to the pasturing of his cattle upon it, the fact that he was not actually upon the premises from the summer, one year, till the spring of the next, (no other person being, in the meantime, in possession,) would not, of itself, be any evidence of a breach of the continuity of possession; that his return to it and planting his corn on it in the spring, would be evidence conducing to prove that he did not intend to abandon the possession, but that he intended to retain it. If, however, the farmer should leave the premises for a single day, with the intention of abandoning the possession of them, it would be a breach of the continuity of his possession of them; therefore, the quo animo—the intention with which one enters on land, leaves it and again returns to it, is often an important matter for Juries to consider, in determining as to the continuity or breach of the possession of it; and his intention is to be determined from all the facts in proof before them. The Court further charged the Jury, that in this case, if they were satisfied, from the testimony, that Albritton, under

whom defendant claims, cut house-logs, split boards and hauled them up to the place of building, then went off the land, with the intention of returning and completing the house, and not with the intention of abandoning the possession of the land, and did return to it the next fall, (there being no other person in possession of the land in the meantime,) completes the house and put his family into it, and live upon and cultivate the land, until he sold it to defendant; and that defendant has been in possession ever since, that the Jury might find that there was no breach of the continuity of the possession of the defendant and of Albritton, under whom he claims; and if the Jury, under these instructions of the Court, should be satisfied that the defendant and those under whom he claims have been in uninterrupted, continuous adverse possession of the land sued for, for seven years before the commencement of this action, they should find for the defendant: if not, they should find for the plaintiff the premises in dispute.

To this charge, plaintiff excepted.

McDonald, for plaintiff in error.

HANSELL, represented by COBB, for defendant.

By the Court.—Benning, J. delivering the opinion.

[1.] It seems that Albritton first took possession of the land in 1841; but that after remaining in possession of it a while he, in the same year, left it and went back to his residence in the County of Franklin, and resided there until the latter part of the year 1842, when he returned to the land in Cobb and resumed possession of it; and that he has kept possession of it ever since.

The question is, did the Statute of Limitations run in his favor, during the interval when he was so residing in the County of Franklin?

And the answer to that question depends on the answer to

another, viz: this—when did the right to bring this suit accrue to the plaintiff or the plaintiff's lessor?

And in respect to the answer to this question, it may be said that the right to bring this suit or to bring any action of ejectment against Albritton, as tenant, did not exist during the time when he was away from the land, residing in Franklin; because, whilst he was thus absent, the owner had no need of any redress by suit. He might have redressed himself by his own act. If he had simply entered on the land and taken possession of it, as he might well have done. he would have been as effectually redressed as he could have been had he been put in possession by the Sheriff, acting under a writ of possession, issued from a judgment in ejectment. (3 Black. Com. 5, 174.) And because, secondly, the owner not only had no need of any redress by suit, but he had no way of obtaining any redress by suit. He could not have sued Albritton, because, as the land lay in Cobb County, the suit would have had to be in that county; and as Albritton. during that time, was in the County of Franklin, and was residing in the County of Franklin, he could not have been served with any suit which was in Cobb; and therefore, he could not have been sued in Cobb.

The right, then, to bring this suit, did not exist during the interval when Albritton remained in the County of Franklin. And if it did not exist during that interval, it could not have accrued until the termination of that interval, and that was not until the return of Albritton to the land.

Our conclusion then is, that the plaintiff's right to bring this suit did not accrue until the return of Albritton to the land. But that return was within seven years next before the commencement of the suit.

To hold the contrary would be to hold, that if A should, under color of title, take possession of the land of B as his own, and hold it for a day, and then should leave it, with the intention of returning to it at the end, say of seven years, and should, in the meantime, keep himself out of the way of a suit, as by remaining in some foreign country, and should,

Gaines et al. vs. Wedgeworth et al.

at the end of the seven years, return to the land, and finding things as he left them, resume possession of it, he would, under the Statute of Limitations, be able to retain the land against the true owner.

We think, therefore, that the Court should have charged the Jury, that the Statute of Limitations could not run in favor of Albritton during the interval when he was in Franklin County, residing in that county. And therefore, we think there ought to be a new trial.

No. 8.—O. P. GAINES et al. plaintiffs in error, vs. WM. WEDGEWORTH et al. defendants in error.

[1.] A motion to amend a confession of judgment, was made on the following affidavit of the Attorneys who gave the confession: "It was distinctly understood and stated by deponents, that we would confess judgment to the plaintiff, reserving the right to appeal, and that said confession was written out by Counsel for plaintiffs and signed by Col. Crook, without said reservation, by mistake or inadvertence." The motion was granted: Held, that it was properly granted.

Ejectment, in Chattooga Superior Court. Tried before Judge TRIPPE, September Term, 1855.

The defendant below confessed judgment to the plaintiff for the premises in dispute, and \$25 mesne profits. From this confession he appealed. A motion was made to dismiss this appeal, because the liberty of appeal was not reserved. Defendant then moved to amend his confession of judgment, and filed the affidavit of his Attorneys, A. B. Culberson and L. W. Crook, that "it was distinctly understood and stated by deponents, that we would confess judgment to the plaintiffs, reserving the right to appeal; and that said confession was written out by Counsel for plaintiffs and signed by Col.

Gaines et al. rs. Wedgeworth et al.

Crook without said reservation, by mistake or inadvertence."
The Court allowed the amendment, and this decision is assigned as error.

WRIGHT, for plaintiffs in error.

UNDERWOOD, represented by HULL, for defendants.

By the Court.—Benning, J. delivering the opinion.

Courts have power, under the Act of 1818, to allow confessions of judgment to be amended in the manner in which it was proposed to be done in this case. (*Pr. Digest*, 441. Seymour vs. Howard, 15 Ga. R. 110.)

The case was one in which the exercise of the power was proper.

The showing for leave to amend amounts to this: The Attorneys who gave the confession announced to the Court that they were willing to confess a judgment, with a reservation of the right of appeal. This they thought was heard and agreed to by the Attorneys on the other side; therefore, they thought that those Attorneys, in writing out the confession, would insert in it a reservation of the right of appeal. And for this reason, they did not examine the confession, to see whether it contained the reservation or not. This is a case of inadvertence. In a case not dissimilar in principle, this Court decided that the party confessing was entitled to a bill in Equity for a new trial. Booth and another vs. Stamper, (6 Ga. R. 172.)

But why should a party be compelled to go into Equity, when his object may be better accomplished at Law, by an amendment consisting in five words—"reserving the right of appeal."

We think the judgment allowing the amendment was right. See Little vs. Ingram et al. (16 Ga. R. 194.)

No. 9.—CALEB TOMPKINS, plaintiff in error, vs. N. J. VEN-ABLE, defendant in error.

[1.] Where it was shown that material words were wanting in an affidavit for the appeal of a case in forma pauperis, a motion was made to supply these words by amendment, and it was shown that they had probably been omitted by mistake: Held, that the record might be amended in this respect.

Case for words, in Cass Superior Court. Decision by Judge TRIPPE, September Term, 1855.

Averdict was rendered against Caleb Tompkins for \$2.000, and he appealed in forma pauperis. The affidavit, as recorded was, "that he was unable to give the security as now required by law, in cases of appeal; that he is advised and believes, that owing to his poverty, he is unable to give security as now required by law." A motion being made to dismiss the appeal, Counsel for Tompkins moved to amend the record, by inserting the words omitted, and in support of this motion, produced the affidavit of James Milner, an Attorney, who swore "that Tompkins brought to him an affidavit as a pauper, and upon looking over the same with some care, he stated to Tompkins that it was correctly drawn, and that he believes it was correctly drawn and in compliance with the Statute." Also of John J. Word, an Attorney, that "some one brought to him an affidavit as a pauper for his inspection, and upon looking over it he stated to said person that it was correctly drawn, and he believes it was drawn in conformity with law." Also his own affidavit, "that he procured the Clerk to write the affidavit for him; that he carried it to Col. Word and Col. Milner, and both told him it was correct; and that he then delivered it to the Clerk; that in fact, he was, at the time. unable to appeal, from his poverty, and he was advised, and did believe, he had good cause for an appeal; and that from Tompkins vs. Venable.

his poverty he was unable to give the security required by

The Court dismissed the appeal, and this decision is assigned as error.

WRIGHT, for plaintiff in error.

PARROTT; HULL, for defendant in error.

By the Court.—STARNES, J. delivering the opinion.

[1.] This is just one of those cases in which we have so often decided that amendments may be made.

We suppose from the argument, that the Court below put his decision upon the ground that the affidavit not being properly entered, there was no appeal; and if there were no appeal, there was no case in Court, and nothing by which to amend. But this was a mistake.

The record shows that the appellant did all which was reasonable and diligent on his part, in order to have his appeal properly entered; and that his original affidavit was probably rightly drawn. If it were not so entered on the minutes, it was not his fault, but the fault or mistake of the Clerk. The attempt was made, therefore, to have the appeal entered rightly, and if it were not so done by mistake, the law will consider that done which was intended to be done, and permit an amendment which will cure the error, if offered within any reasonable time.

We have, in effect, decided this point in several cases. In the case of Little vs. Ingram, (16 Ga. Rep. 194,) we went so far as to hold, that an amendment, nunc pro tunc, would be allowed, even after judgment, where process had been waived before the Clerk, and he authorized to make an entry accordingly, but which that officer had failed to do. See that case for our views more at large upon the point.

Let the judgment be reversed.

No. 10.—WM. C. CLELAND et al. plaintiffs in error, vs. Tho-MAS J. WATERS et al. executors, &c. defendants in error.

[1.] A testator, by his will, made the following bequest, to-wit: "Whereas, I own and hold in possession the undernamed slaves" (naming sundry slaves). "On account of the faithful services of my body servant, William, (the husband of Peggy,) I will and desire his emancipation or freedom, with the future issue or increase of all the females mentioned in this item of my will. If it is incompatible with the humanity, &c. of the authorities of the State of Georgia, I direct my qualified executors to send the said slaves out of the State of Georgia, to such place as they may select; and their expenses to such place shall be paid by my executors out of my estate; and my will is that the whole of the proceedings be conducted according to the laws and decisions of the State of Georgia-I having no desire or intention to violate the spirit, or intention, or policy of such laws. And I do further direct that if any person to whom any bequest or disposition made in this item, offer any impediment to its being carried into execution. he or she shall in no event receive any part of my said estate; but my executors are enjoined to withhold from the person so opposing, any share or portion herein devised or bequeathed to him or her; and to distribute the share so forfeited amongst my other heirs, per stirpes and not per capita. I desire that the said slaves, if compelled, may select their residence out of the State of Georgia, and in any part of the world:" Held, 1. That the intention of the testator was to manumit all the slaves mentioned in this item of the will. 2. That it was the wish of the testator for the slaves to be set free and remain in Georgia, provided the consent of the Legislature could be obtained for that purpose; otherwise, they were to be removed beyond the limits of the State, they to select the place where they could be free. 3. That such disposition is not repugnant to the laws of the State; and 4. That the policy of a State is to be gathered from its constitution and laws.

In Equity, in Gwinnett Superior Court. Tried before Judge Jackson, September Term, 1855.

The only question made in this case was, as to the validity of the following item in the will of George M. Waters;

"3d. Whereas, I own and hold in possession the undernamed slaves, to-wit: (naming sundry slaves). On account of the faithful services of my body servant, William, (the husband of Peggy,) I will and desire his emancipation or freedom, with the future issue and increase of all the females mentioned in this item of my will. If it is incompatible with the humanity, &c. of the authorities of the State of Georgia,

I direct my qualified executors to send the said slaves out of the State of Georgia, to such place as they may select; and their expenses to such place shall be paid by my executors, out of my estate; and that the whole of this proceeding be conducted according to the laws and decisions of the State of Georgia—I having no desire or intention to violate the spirit, or intention, or policy of such laws; and I do further direct, that if any person to whom any bequest or disposition contained in this item, offer any impediment to its being carried into execution, he or she shall, in no event, receive any part of my said estate; but my executors are enjoined to withhold from the person so opposing, any share or portion herein devised or bequeathed to him or her, and to distribute the share so forfeited among my other heirs, per stirpes and not per I desire that the said slaves, if compelled, may select their residence out of the State of Georgia, and in any part of the world."

The Court below held this item to be valid, and not repugnant to the Acts of 1801 and 1818. This decision is assigned as error.

McDonald; Cobb & Hull, for plaintiff in error.

HUTCHINS, PEEPLES, T. R. R. COBB, for defendant in error.

The Court not being unanimous, delivered their opinions seriatim.

By the Court.—LUMPKIN, J. delivering the opinion.

When this case came before this Court at Gainesville, October, 1854, we held, unanimously, that it was the *infention* of the testator, to manumit all the slaves mentioned in the third item of his will. (16 Ga. Rep. 496.) And the only question now is, can that intention be executed?

It is insisted-that it cannot, because it is an attempt to free the slaves and suffer them to remain in Georgia. If this was a bequest of freedom to the slaves, to take effect immediately

in this State, it would, undoubtedly, be void. But such is not our interpretation of the will. We read it precisely as Judge Jackson did; that the wish of the testator was, for .his slaves to be free and remain in Georgia, "if compatible with the humanity of the public authorities;" that is, by permission of the Legislature. It was, in other words, a direction to his executors to apply to the Legislature to free the slaves and let them remain in the State. This the testator could have done in his lifetime; and this he could direct to be done by his executor after his death. For, although it may not be unqualifiedly true, that an individual may do as he pleases with his own property during his life, and by his testament, delegate to another the same right after his death; still, it is not pretended that such an attempt as this, by the testator, in his lifetime, or direction to his representative after his death, would have contravened any law of the land.

Indeed, the Act of 1801 clearly recognizes the right of the owner to apply to the Legislature to free his negroes. (Cobb's Dig. 983.) And the 11th section of the 4th article of the Constitution, by prohibiting the Legislature from passing laws for the emancipation of slaves, without the consent of their owners previously had for that purpose, concedes, by necessary implication, the right of the owner to apply to the Legislature to exercise this power. (Cobb, 1125.)

Our construction therefore is, that Mr. Waters directed, by his will, his executors to apply to the Legislature to free his slaves and let them remain in the State; and that this application being made within a reasonable time, (none being specified,) and failing, by the refusal of the Legislature to pass the Act, then he desired his executor to take them beyond the limits of the State—they to select their place of abode—where they could be free.

It is contended that, conceding the slaves were to be removed beyond the limits of the State, in order to acquire, as well as to enjoy, freedom, that the will is nevertheless inoperative, for various reasons: some of the most prominent of which we will proceed to notice:

First, because the election is given to the slaves to choose where they will go; and that they are incapable of making this choice. And in support of this position, Carroll and Wife vs. Bumby, adm'r, (13 Ala. Rep. 102,) is cited and relied The decision in that case was upon a point somewhat different from the present, namely: a choice on the part of the slaves between freedom and servitude. Here it is simply as to their future residence. The question is as to removal and not of emancipation. Grant that in principle, however, the cases are the same, to what extent the Alabama case may have been influenced by the local laws of that State I cannot say. It seems to be assumed, both in the argument of Counsel, as well as in the opinion of the Court, that the testator had no legal right to offer to his slaves the privilege of migrating to Africa, "because it was prohibited by the laws of the State." Be this as it may, the whole tenor of adjudications upon this subject, both in Georgia and elsewhere, have proceeded upon the assumption that slaves, as such, might choose between foreign freedom and domestic servitude.

In Jordan vs. The Heirs and Distributees of Bradley, emancipation was made to depend expressly upon the wish of the slaves; and the recommendation of the Court to the executor, was to interrogate the slaves as to their desire, in the presence of the legatees and respectable neighbors, and to make a memorandum or record of their answers. And the decree in this case was approved by the Judges in convention, and has been considered as the settled law of the State ever since. (Dudley's Rep. 170.)

So, in Elder vs. Elder's Ex'r, (4 Leigh's Rep. 252,) the testator bequeathed that his negro woman C, and her child A, and C's increase, be given to G D, in trust, to be sent to Liberia, provided the expenses of their transportation would be defrayed by the Colonization Society; and that the rest of his negroes, who might be willing to go, should be left in trust to said G D, to be sent to Liberia in the same manner; but that those who should prefer to stay should be given, within twelve months, to his brother. Testator's estate being

involved in debts, which the other assets would not suffice to pay, the executor hired out the slaves for several years, to raise a fund out of which to discharge the debts. The Court of Appeals held, that this was an effectual emancipation of such of the slaves as preferred to go to Liberia. And further, that it was not necessary that they should elect to go within twelve months, provided they made such election when offered to them.

"In the construction of wills," says Carr, J. "we are to find out the meaning—the intention—the will of the testator; and unless that violates some principle of law, it must be carried into execution. To my mind, it is just as clear as any form of words could make it, that this testator wished that all his slaves should be given up to Dissosway, to be transported to Liberia, there to be free, if the Colonization Society would pay the expenses of removal, unless any of them should prefer to stay here and be slaves. And such he willed should be the slaves of his brother, the appellant. believe he had an idea of making their election within twelve months a condition which, under all circumstances, should be strictly performed, and on failure of which, they should be the slaves of his brother. He thought it probable, I suppose, that the choice would be submitted to them within the twelve months; and meant that all who, upon such submission, should express a preference for remaining, should thereupon be handed over to his brother. The residuary legatee having filed his bill, and thus brought the subject before the Court, the Chancellor very properly appointed commissioners to examine These commissioners have reported that all but one have elected to go to Liberia; that two of them were too young, (one being six and the other two years old,) to make a choice; and that in these cases they had taken the choice of their mothers. In this I think they acted very properly. It is certain, that the testator did not, on account of their infancy, intend to condemn them to unconditional slavery; and who so proper to decide for them as their mothers?"

Such was the view taken of this subject by the Court of Appeals of Virginia.

In Frazier et al. vs. Frazier's Executors, (2 Hill's Ch. R. 305,) the direction in the will was, that "the negroes-be set free by my executors." And then, after directing a fund to accumulate for the benefit of the slaves, it was directed that this "fund was to enable them to go to St. Domingo or any part they might choose." The Court held the will was legal, and should be executed. And upon a bill filed by the next of kin, claiming the slaves, the executors were ordered to remove them to parts beyond the State, where emancipation was lawful, and there set them free.

In this case, as in the one before us, a latitude of discretion is left to the slaves in the selection of their future home, not being restricted by the words of the will even to a free country.

The same principle was settled in the celebrated Ross Case, involving property to the value of about a half a million of dollars. (5 Howard's Miss. Rep. 305.) There, emancipation depended upon the will and election of the slaves. And the ground was distinctly taken by the able Counsel who argued against the will, that the slaves, as devisees, were incompetent to choose. The will was sustained and ordered to be enforced.

In Leech vs. Cooley, ex'r, &c. (6 Sm. & Mar. 93,) the testator directed his slaves to be set free and sent to Indiana or Liberia, as they might prefer. The will was held to be valid, and the executor decreed to proceed in its execution.

But I forbear to multiply cases. The Reports from the slave States are full of them. The reasoning which seeks to invalidate this will upon the ground that slaves, as such, are incapable of choosing, is too technical to commend itself to my approval. Besides, it proves too much. It would go to the full extent of maintaining that freedom could not be conferred upon a slave at all, even were there no law prohibiting it; because, being in a state of servitude, he would be incapable of consenting to be free! Suppose a testator were, by

his will, to direct his executor to dispose of his slaves, by sale, to such persons as they might select, provided they were willing to take them at their appraised value-would not the executor be justified in carrying out the trust? are property—chattels if you please; still, they are rational and intelligent beings. Christianity considers them as such. and our municipal law, in many of its wise and humane provisions, has elevated them far above the level of the brute. We should deeply regret to be compelled to decide that a benevolent disposition like that referred to, and others that might be put, involving to some extent the volition of the slave, was nugatory. Our examination has furnished us with no such rule, applicable to slavery. It is at war with the whole train of adjudications in this and our sister States, as well as of every other civilized country. Infants and feme coverts, notwithstanding the general disability under which they labor, are still capable of consenting and choosing, for many purposes, more especially in matters for their benefit. In the absence of all legal restraint, and upon a point affecting the owner and his slaves only, and where no considerations of public policy intervene, we do not see the paramount necessity of establishing a doctrine so stringent.

2. Another objection urged against this will is, that if these slaves are not freed in Georgia, they are freed no where.

Taking the whole will together, our interpretation of it is, that it directs the executors, first, to apply to the Legislature to manumit the slaves, suffering them to remain in this State; if this cannot be done, then to carry them to some country to be selected by the slaves, where they will acquire freedom, by the operation of the *lex loci*, independent of any act to be performed by the executor.

For myself, I utterly repudiate the whole current of decisions, English and Northern, from Somerset's case down to the present time, which hold that the bare removal of a slave to a free country, either by way of transit in travelling, or the convenience of temporary sojourn, will give freedom to the

African slavery may, in the rhapsodical language of British Jurists, be inconsistent with the genius of their Constitution—if so, it is the only species of slavery that is. this is certainly not true, under the Constitution of the United Upon the principle of international law, properly expounded and applied, to promote the free and unembarassed intercourse between the citizens and subjects of foreign States, we maintain, that the judgment in Somerset's case was Much more so are the decisions in this country, to the same effect, under a compact formed to abolish alienage, and to establish a more perfect union between the States constituting our confederacy, recognizing slavery as it does, in the broadest terms, and guaranteeing its enjoyment. status of the slave under our system, united as we are under the same federal authority, and governed by the same laws, should never have been held to be affected by the temporary residence of the owner in a free State. It was not necessary to the maintenance of any local policy, that the Northern States, in the exercise of their undoubted right to abolish slavery, should have held that citizens of the slave States were thereby prevented from coming among them or passing through with their families and servants. Prior to 1836, the Courts even in Massachusetts had made no such decision. This fungus has been engrafted upon their Codes by the foul and fell spirit of modern fanaticism. Indeed, the Legislatures of many of the free States passed laws securing to citizens of the slave States, who came within their territories, upon business or pleasure, and brought slaves with them, means and facilities to take those slaves back to their domicil. Laws of New York, 657; Laws of Rhode Island, 607; Purdon's Dig. of Laws of Pennsylvania, 650; Laws of New Jersey, 679.)

Still, it cannot be denied that whenever slaves are removed to a free country, with a view to change their former domicil and to remain there permanently, they cease to be slaves, naturally and necessarily. And a fortiori, will this conse-

quence follow, when they are carried to a free State, for the express purpose of being liberated.

The right of removal, then, to a free State, was all that was needed to bestow freedom upon these slaves. No express power to emancipate was required. (3 Monroe's Rep. 104; 2 Marshall's Rep. 467.) I have deemed it necessary to be thus guarded upon this delicate and important point.

3. Is this will in conflict with the existing laws of this State, prohibiting manumission?

I examined this question somewhat at length, when this case was last up, (16 Ga. Rep. 496,) and satisfied myself that extra-territorial emancipation was not forbidden by the Statutes of 1801 and 1818. I take this occasion to state emphatically, however, whatever opinions I may have expressed heretofore upon this subject, that I am fully persuaded that the best interests of the slave, as well as a stern public policy, resulting from the whole frame-work of our social system, imperatively demand that all post mortem manumission of slaves should be absolutely and entirely prohibited. is a cherished institution in Georgia-founded in the Constitution and laws of the United States; in her own Constitution and laws, and guarded, protected and defended by the whole spirit of her legislation; approved by her people; intimately interwoven with her present and permanent prosper-Her interests, her feelings, her judgment and her conscience-not to say her very existence, alike conspire to sustain and perpetuate it. We may not be able to prevent expatriation of the living-to restrain the master in his lifetime from removing whithersoever he pleases with his property; but when the owner has kept them as long as he can enjoy them, shall he, from an ignorance of the scriptural basis upon which the institution of slavery rests, or from a total disregard to the peace and welfare of the community which survive him, invoke the aid of the Courts of this State to carry into execution his false and fatal views of humanity? Is not every agitation of these cases in our Courts attended with mischief? Is not every exode of slaves from the inte-

rior to the seaboard, thence to be transported to a land of freedom, productive of evil? Can any doubt its tendency? Are there not now in our midst large gangs of slaves who expected emancipation by the will of their owners, and who believe they have been unjustly deprived of the boon? Are such likely to be good servants? On the contrary, are they not likely to sow the seeds of insubordination, perhaps of revolt, amongst the slaves in their neighborhood?

Deeply impressed with these views, I have earnestly solicited the immediate attention of the present Legislature, (1855-'6) through the Chairman of the Judiciary Committee of the Senate to the subject. Still, whatever may be the strength of my convictions, I feel bound by the construction which has been put upon the law by the eminent Judges who have preceded me, until the Legislature see fit to intervene. It is due to candor to avow that I entertain not a shadow of doubt that the decision by the Convention, in Dudley, is in strict accordance with the true meaning and intent of our Statutes.

Much was said in argument by Governor McDonald, as to the rules for the construction of Acts. They all resolve themselves into one single purpose, namely: to ascertain the meaning of the law. And whatever conduces to that end, may be fairly put in requisition, whether it be drawn from the preamble, title or body of the Act, or from cotemporaneous history or legislation, indicating the peculiar condition and circumstances of the community in whose behalf the Act was passed. A narrow and restricted application of a Statute, is as likely to fall short of the legislative will, as the more unbridled latitude of construction. Both extremes are to be avoided. In my judgment, the law in this case expounds itself and leaves no room for cavil.

The Act of 1801, (Cobb, 983,) purports to be an "Act prescribing the mode of manumitting slaves" where? In Liberia? Or Ohio? No! but "in this State." It attempted nothing else; it effected nothing else, as its terms plainly demonstrate. But this Act, restricted as it was in its object,

was found to be insufficient, even for that purpose. Besides, the Courts had construed the 3d section of this Act too literally. It was in these words: "It shall not be lawful for the Clerks of the Superior Courts, or any other officer of the State, to enter on record, in any book of record by them kept, any deed of manumission or other paper, which shall have for its object the manumitting or setting free any slave or slaves; and the party offending herein, for every deed or other paper so recorded, the sum of \$100 to be recovered by action of debt," &c. Is not this language exceedingly broad? "Any deed or other paper!"

And yet, when the Supplementary Act of 1818 was passed, more effectually to enforce the Act of 1801, it is declared that the third section of this latter Act should be construed to extend to inhibit the recording only of so much of any instrument (as is therein described) as shall relate to the manumitting or setting free of any slave or slaves. (Cobb, 990.)

We repeat, and it is not without its point in the further examination of this case, that the cardinal rules in the interpretation of Statutes is, that the legislative will must be looked to; and that this intention of the law-maker is to be deduced from every part of a Statute, compared with every other part; and that the true meaning and design, when thus elicited, must prevail over the letter of the law. I will now add another rule, learned by every student while reading Blackstone, but too often overlooked in his subsequent professional and judicial career; and that is, that good sense must never be departed from in the exposition of a Statute, whatever other sense, literal or latitudinous, may be.

The preamble to the Act of 1818 recites, "That whereas, the principles of sound policy, considered in reference to the free citizens of this State, and the exercise of humanity toward the slave population within the same, imperiously require that the number of free persons of color within this State, should not be increased by manumission, or by the admission of such persons from other States to reside therein," fc. "Be it enacted, therefore, that the Act of 1801 shall

be strictly enforced," &c.; "that all and every will and testament, deed, whether by way of trust or otherwise, contract, agreement or stipulation, or other instrument in writing, or by parol made and executed for the purpose of effecting, or endeavoring to effect, the manumission of any slave or slaves. either directly, by conferring, or attempting to confer, freedom on such slave or slaves, or indirectly or virtually, by allowing and securing, or attempting to allow and secure, to such slave or slaves, the right or privilege of working for his, her or themselves, free from the control of the master or owner of such slave or slaves, or of enjoying the profits of his, her or their labor or skill, shall be, and the same are hereby declared to be, utterly null and void." And the Act proceeds to inflict a penalty of \$1.000 on all persons making, or concerned in making, any such deed or other instrument in writing; and further directs, that the slaves in whose behalf the same shall be made, shall be liable to be arrested by warrant; and being thereof convicted in the manner therein prescribed, shall be liable to be sold as slaves at public outcry, and the proceeds appropriated to public purposes. 991.)

Without stopping to inquire what becomes of the rights of the next of kin, under the provisions of this Act, if, indeed, it apply to the case, does not the preamble show, conclusively, the nature of the evil intended to be remedied? And will that evil be produced or increased by the execution of this will?

By the 10th section of this Act, it is made the duty of all Courts and Judges to construe the Act and carry the same into operation "according to the spirit, true intent and meaning thereof, as set forth in the preamble,"

The mischief, then, was the accumulation of free negroes residing amongst us, from the acts of emancipation by their owners, and by immigration from other States. This was the only evil the law undertook to redress; and the most stringent enactments were adopted for that purpose. The Legislature did not intend to impose any other restriction

upon the undoubted right of the citizen, to dispose of this species of property by will, deed or otherwise, as he might please, except by holding him in a state of obedience to its municipal policy as to free negroes. The State did not intend, by these Acts, to assume jurisdiction, except within her own limits. The right to remove—to emancipate, is not taken away; it is only prohibited when attempted to be exercised within her own borders. The State did not expect her judicial process to reach to Liberia or New York, and arrest, by warrant, liberated slaves, with a view to again reduce them to servitude, by having them sold at public outery.

The Colonization Society was not organized until 1816; and in 1817, by an Act yet in force, the Governor was directed to deliver to this Society Africans illegally imported into this State, and "aid in promoting the benevolent views of said Society, in such manner as he might deem expedient." (Cobb's Digest, 989.) And again, by resolution in 1820, two years after the Act of 1818 was passed, certain Africans, illegally imported, were offered to this Society. (See Resolutions of 1820, Vol. IV. p. 5 of Resolutions.)

In view of the degradation of the free blacks, both in the slaveholding and non-slaveholding States of the Union, philanthropists of both sections favored, at first, this scheme of Colonization. The people to be sent there, were all from the United States, speaking our language, pursuing our habits, professing our religion and imitating our political institutions. It was hoped that they would become a sober, industrious and progressive community, elevating themselves as well as the surrounding natives, in the scale of civilization. How far these hopes have been realized, it is foreign to my purpose to inquire. It is enough to say and to show, that nothing was more foreign from the thoughts of the men of 1818, than to prohibit a citizen from directing, by his will, that his negroes should be removed out of the State to Liberia or elsewhere, for the avowed purpose of emancipation. Neither the Act of that year nor its predecessor, were intended to infringe upon this privilege.

And we must expound these Acts in the light of the times in which they were passed. We are now told, and told truly, that "slaves constitute a portion of the vested wealth and taxable property of the State; that without them, a large portion of our most productive lands would be worthless: that it would be contrary to her policy, therefore, to part with this vested wealth; this polific source of revenue, with that which alone renders her cotton and rice lands valuable; that it is spreading a dangerous influence among the negroes of the country, for the slaves of whole plantations to acquire their freedom, take leave of the country, and make their departure with great pomp and parade, proclaiming liberty for themselves and their posterity; that it renders those who are left behind dissatisfied, refractory and rebellious, and that it may and probably will, if not checked in time, lead to insubordination and insurrection; that the Colony of Liberia, instead of being an enterprise worthy of encouragement, is the germ whence is likely to spring elements of great mischief to And although the Colonization Society is estabthe South. lished to colonize, on the coast of Africa, such free persons of color as may voluntarily go, or such slaves as may be manumitted by their owners for that purpose, yet, its members and friends look forward to the entire overthrow of slavery in this country, as a consequence of their success, though not as an object or design of their association; that every number of the African Repository, the organ of the Society, is replete with evidence that such is the tendency, if not the design of this scheme."

"That supposing the non-slaveholding States, north-west of the Ohio, were willing to receive our free negroes, (a supposition by the way wholly untrue,) would it be good policy in us to locate them on our borders, beside our great rivers, forming free negro colonies in constant intercourse with our slaves? Would not such a population, inhabiting a country near us, become a dangerous receptacle for our fugitive slaves? Would not the time come, when an attempt to

seize our runaway negroes, would produce serious collision and border war with the States contiguous to us?"

We feel the full force of these arguments. They have been addressed to this and other Courts before, but have failed to produce conviction, for the simple reason that such appeals are made to the wrong tribunal. They should be submitted to the halls of legislation, and not to the Courts of Justice. It is not the province of the Courts to make public policy, but simply to declare it, as it exists. The policy of a State is to be gathered from its Constitution and laws. lic opinion is too transient and changeable to become a rule of decision. It must take the shape of settled law before the Courts will undertake to enforce it. The policy of Georgia seems to be, at this very day, opposed to the further importation of slaves into the State, and consequently to the increase of this species of population. And although her legislation has fluctuated upon this subject, she never has indicated, for the first time, in any manner, her policy to prohibit the exportation of slaves. Such a change as this, I insist upon it, should be inaugurated by the people themselves, either in convention or through the Legislature. on the Law of Villeinage, in England, while treating of its final destruction during the reign of Charles II. say that "the bent of the English Law is towards liberty." again, that "the law is always ready to catch at anything in favor of liberty." Now while I concede that our laws, relative to negro slavery, manifest no such "bent towards liberty" at home, nor are they "always ready to catch at anything in its favor," it must be confessed that no contrary policy can be deduced from them relative to foreign emancipation.

But it is insisted that the words of the law are broad enough to prohibit manumission out of as well as within, the State, by a citizen of the State. The language of the Statutes, I admit, is very general. But every part must be looked to, to ascertain the meaning. And effect must be given to

And one of the means devised to every clause and passage. secure an observance of the law, is inconsistent with the idea of manumission abroad. Under the Act of 1801, the slaves manumitted contrary to its provisions, were declared to be still, to all intents and purposes, as much in a state of slavery as they were before they were set free. (Cobb, 983.) under the Act of 1818, they were made liable to be arrested by warrant, to be issued by any Magistrate, and sold at pub-(Cobb, 990.) I will not be guilty of the disrelic outerv. spect of imputing to the authors of this law the folly of supposing, that any legal process, emanating from our municipal authorities, could reach beyond our own limits. On the contrary, I refer to these provisions to show that the Legislatures of 1801 and 1818, had in their mind domestic manumission only; and that it was against this evil only that these rigid penal enactments were directed. To our mind it is clear, that these are mere municipal regulations, aiming simply and exclusively at the internal police of the State; and that the emancipation which results from the removal of slaves to a foreign country, is neither within the letter or the spirit of the law. To rid themselves of free negroes, and to prevent the increase within their borders of this obnoxious population, will be found, upon examination, to have been the steady policy of all the slave States. But all their laws, up to a recent period, respecting slaves, and free persons of color, will be found to aim at this end only, and to stop at this point. In several of the States, as in ours, the preamble to their Statutes recites, expressly, that this is the object contemplated. And it would be almost as reasonable to hold that the provisions of our Penal Code, against teaching slaves or selling them spirituous liquors, had an extra-territorial application, as that the Acts of 1801 and 1818 have.

The cases are numerous, in which the Courts have decided that statutory limitations, similar to ours, upon the right of emancipation, are merely police regulations, and do not vitiate or affect manumission, resulting from the operation of a foreign country. (6 Yerger, 119; 1 Bibb. 422; 3 Munroe,

104; 1 Leigh's Rep. 172; 8 Louisana R. 475; 11 do. 499; 14 do 410; 2 Howard's (Miss.) R. 837.)

Indeed, the late Chief Justice Chilton of Alabama, whose retirement from the Bench may be justly esteemed a great public loss, after a critical and thorough review of all the authorities, justly remarks, that if any point may be considered as settled by the consistent decisions of the slave States, the cases establish the proposition, that unless restrained by positive enactment, a testator may, by his will, effect the manumission of his slaves, by vesting the title to them in trustees, for the purpose of their removal to a free State, there to enjoy their freedom. (Atwood's Heirs vs. Beck, adm'r, 21 Alabama R. 622.)

It may not be unprofitable to advert, briefly, to the Statutes of some of our sister States, and the exposition given to them by their Courts. And if apology be needed for the time consumed in the investigation of this subject, I trust it will be found in the fact, that this is the third time this question has been presented for our review, within the last twelve months. Nor will it be the last.

The law, as it stood formerly in Mississippi, was in these words: "It shall not be lawful for any person, being the owner of slaves, to emancipate them, unless by his or her last will and testament, attested and proved in the manner required by law; and also prove such slaves have performed some meritorious act for the benefit of such owner, or some distinguished service for the benefit of the State; and such last will and testament shall not have validity until sanctioned by the Legislature; nor until the owner shall have complied with the conditions specified in such act."

In the law of Mississippi, it will be perceived, that there is no declaration by the makers, as there is in the Act of 1818 in this State, that its object and policy were to prevent the accumulation of free negroes at home, by manumission and immigration. And yet, the Courts of that State uniformly held that the Statute did not prohibit a citizen of that State from directing, by will, that his slaves should be removed out

of the State to Liberia or elsewhere, though the avowed intention was emancipation; that the law did not take away the right to emancipate, but qualified it only, when exercised within the limits of the State; and that the Courts would not look beyond the act of removing slaves from the State to their place of destination, to see whether, by the laws of that place, emancipation would be a consequence of such removal. (5 Howard's (Miss.) Rep. 305; 6 Sm. & Mar. 93; 7 1b. 663.)

The Act of South Carolina was exceedingly broad. It provided, "that no slave shall be emancipated but by Act of the Legislature." (Acts of 1820, p. 22.) This is, in a few words, the substance of our law. And from the preamble to the Act, it appears that in our sister State, as here, there was a rapid increase of free negroes by emancipation and admission from other States. And there, as here, the remedy resorted to was, that emancipation should only take place by Act of the Legislature. But what did the Courts of that State hold as to the interpretation of their law? "The provision is general; and might, from the words, prohibit emancipation out of as well as within the State. But it is a construction altogether by the letter and not by the spirit of the law; for the intention of the Legislature is manifest, to prohibit the emancipation of slaves within the State, except by Act of the Legislature. The evil was the increase of free negroes within the State. If this is remedied, the end of the law is obtained.' (Per Curiam Frazier and others vs. Frazier's ex'rs, 2 Hill's Ch. R. 304.)

By a subsequent Act, passed in 1841, (11 Statutes, 154,) it is made unlawful for executors to carry slaves out of the State, with a view to their emancipation. And a similar law has been passed in Mississippi.

But for the fear of extending this opinion to an unreasonable length, I would examine the laws of the rest of the slave-holding States, together with the judicial construction given to them. But we go no further upon this point, except to remark, that the cases cited by Counsel for the plaintiff in error, do not conflict with the principles established in those

which have been examined; and that the views above presented, are not shaken in any of them; and that our conclusion is, that every person in this State, sui juris, having the power, by will, to dispose of his own property as he pleases, may exercise this power in regard to slaves, unless prohibited by law; and that while the Acts of 1801 and 1818 are unquestionably opposed to the manumission of slaves in this State, we see nothing in these Statutes limiting the power of the testator to send his slaves to Africa or elsewhere, in his lifetime, there to remain free; or to direct it to be done by his executor, after his death. And further, that there is nothing in the policy of the State, as declared in these Acts of the Assembly, opposed to such intention, in any form.

4. In the next and last place, it is asked, that conceding all that is said, how and at whose instance is this trust to be enforced? It is alleged that these slaves have no civil rights—can hold no property, nor maintain a suit in Court, either at Law or in Equity, prior to their emancipation; and that, therefore, the bequest must be void for want of the means of enforcing it.

But what reply did the Court make to this position, in Frazier's case, in 2 Hill? "We apprehend that in this case, and others like it, there is no difficulty; for on a bill filed by the heirs to partition the slaves, the Court would, if, on looking into the will, they should find that the executors could execute it by sending the slaves out of the State, and there set them free, order them to discharge the trust reposed in them by the testator. In other cases, the executor's oath to execute the will, and the fair claim which they have to the confidence of the Court by the confidence reposed in them by the testator, are sufficient guaranties that such a bequest will be faithfully executed."

This opinion is cited with approbation by the Supreme Court of Alabama, in the case of Atwood's Heirs vs. Beck, adm'r, already referred to. And in both of them trusts similar to this in Water's will were held to be valid. The same

question has been presented and undergone a thorough discussion in the State of Mississippi, with the like result.

I must say, that to my mind it is clear, that the difficulty in this matter arises from a want of accuracy in stating the It is laid down, broadly, that a trust is void proposition. which cannot be executed. And this is true, if it cannot be executed, for the reason, that it is contrary to law; as for instance, a bequest in a will, directing the slaves of the testator to be manumitted in Georgia. But if it be assumed that a trust is void because of the legal incapacity of the slave to enforce it, then I deny the doctrine. And I maintain, that a testator may create any trust, by his will, which is not contrary to law; and that the executor will be protected in executing it. I go further, and insist, that as an honorable man, it is a high duty not to violate the confidence reposed in him. Should the executor apply to the Court for direction, as in the present case, the Court will thereby acquire jurisdiction and decree the execution of the trust. the same result would follow, should the next of kin move in the premises.

How common it is for a testator, by his will, to give directions concerning a portion of his estate, not only perfectly consistent with law, but altogether commendable—such as the bestowment of charity, the erection of a monument, or church, or school, and yet, the law has provided no mode of enforcement. Would it, in all such cases, interpose to prevent its enforcement? Would it not, in all such cases, leave it to the voluntary action of the executor? Should he fail to proceed within the time limited by the will, or within a reasonable time, where none is specified, it would be competent for the next of kin, or heirs at law, to ask for a distribution of the fund, which would bring the whole case before the Court, for its direction.

Judgment affirmed.

STARNES, J. concurring.

I concur with my brother LUMPKIN in affirming the judgment of the Court below, though I cannot say that I entirely agree with him or the Court in that reasoning which brings them to the same result with myself.

From the time when this will first came under my examination, (at a previous term of this Court,) I have been of opinion that the true legal construction of the clause in question is, that the testator intended the emancipation of William, together with the future increase of the female slaves mentioned, if this were compatible with the laws and policy of Georgia; if not, then that all the slaves mentioned should be sent out of the State to such place as they might select. I so expressed myself when I delivered the opinion for my colleague, Judge Lumpkin, (who was temporarily absent,) in the first case made upon this will. If I had written out the opinion in that case, I should have so expressed myself again.

Upon examination of the will closely, I became satisfied, that in the other view of the subject, it was necessary to supply so much, in order to give connection and meaning to the terms of the will, that it would be venturing on dangerous ground, and might possibly amount to the making of a will for the testator.

I certainly agree with my brother Lumpkin, in believing that the meaning which is thus attributed to the testator, was not his real intention. I have no doubt he intended that all of his slaves specified, if they could not lawfully have their freedom in Georgia, should be sent to a free country. But the questions with which we were pressed were, did the will, as it stood, give legal expression to such an intention? And if not, can the Court undertake, without a violation of sound principles of construction, to supply the requisite meaning?

Recognizing, as I did, the real intention, but doubting that it could be carried into effect with the will as it stood, I ex-

amined that instrument to ascertain whether or not I could find a plain *legal* construction which might effectuate the same result. I found such construction in that exposition of the terms which I have stated.

From such terms, so construed, it was to be inferred that the testator, not fearing to trust his other slaves with his children, was willing that they should remain in bondage with them; but as the issue of those slaves would, in all probability, pass into the hands of descendants who never knew the testator-might have no attachment to his memory or regard for his wishes, or into the hands of strangers, he desired their emancipation. But if this were incompatible with the policy of the laws of Georgia, then he desired all to be sent abroad. According to this reading, the sentence must be construed as follows: "On account of the faithful services of my body servant, William, (the husband of Peggy,) I will and desire his emancipation or freedom, with the future issue and increase of all the females mentioned in this item of my will. If it" (that is, the emancipation of William and these children,) "is incompatible with the humanity," &c. ("humanity," &c. may be readily construed to mean policy, or humanity and policy,) "of the authorities of the State of Georgia, I direct my qualified executors to send the slaves out of the State of Georgia," &c.

In this view of the subject, nothing has to be supplied, so that it may be said, by way of objection, that we are making a will for the testator; and yet, what we recognize as his real intention, may be carried into effect.

Thus construing the will, I see no difficulty in giving legal effect to the intention of the testator. If it were not compatible with the laws and policy of Georgia, as it certainly was not, at the time of the death of the testator, that William and the issue of the females should be emancipated in the State of Georgia; and if they could not be allowed to remain, thus emancipated, with their kindred, in the State, as they certainly could not without a change of existing laws, then the duty of the executors was, to send them and all the other

slaves specified out of the State of Georgia, provided it was lawful thus to remove slaves from the State of Georgia, for the purpose of giving them freedom, which subject I will presently consider.

But even if this construction be not adopted, and it be held that this will may be so construed, (which seems to be the opinion of my brother LUMPKIN,) as to show that the testator manifested an intention that all the slaves should be emancipated in the State; and in the first instance, if this could be done legally; and if not, that they should then be sent out of the State, I do not see the difficulties suggested by the Counsel for the plaintiff in error; indeed, I do not see some of those which presented themselves to the mind of the Court below: difficulties of which the ingenious and learned Counsel availed themselves to strengthen their line of attack upon I think I can see that the will may be carried into effect, whichsoever of these two constructions be adopted, without the necessity of an application to the Legislature in the first instance; and that it is unnecessary to hold that the testator contemplated such application to the Legislature, and a refusal on the part of that body to emancipate these slaves, before it could be ascertained that it was incompatible with the policy of Georgia that these slaves should be emancipated and remain in the State. According to the view which I take of the matter, it will be perceived, a reasonable construction would have been, that if by reason of the existing state of the law at the death of the testator, (for he might have deemed it possible that the law, as it stood when he wrote his will, would be changed at some future day,) it would be incompatible with the policy of Georgia for these slaves to have their freedom within the State, then that the executors should have authority to remove them. And I think that these executors, by this construction of the will, knowing or being advised, that without a change of existing laws, it was incompatible with the policy of the State for the slaves to have

their freedom in Georgia, might have proceeded at once to send them into a foreign country.

By construing the will in the way I have suggested, and preserving a logical connection of its terms, we cause to vanish the difficulty so earnestly presented by the learned Counsel for the plaintiff in error, viz: that the first portion of this clause, "on account of the faithful services of my body servant, William, I will and desire his emancipation, with the future increase of the female slaves," &c. was intended "to effect emancipation absolutely, in the first instance, and that what follows is a mere expression of a desire, that if such emancipation was inconsistent with the humanity or policy of Georgia, the slaves should be sent out of the State, and has nothing to do with their emancipation."

The ingenious Counsel were enabled to ply this argument with great force, aided as they were by the idea, that the testator designed the emancipation of his slaves absolutely and within the State, and wanted the consent of the Legislature to that arrangement. But if this could not be effected, as a secondary consideration, desired that they should be removed into a foreign country.

Such was the objectionable provision in Butler's Will, considered in the case of Trotter, adm'r, vs. Blocker and Wife, (6 Port. 269,) and by construing the provisions of this testament so as to exhibit an analogy with that will, the learned Counsel sought to obtain the benefit of the very able decision in that case, made by the Supreme Court of Alabama. decision there was put expressly upon the ground that the bequest of freedom to the slaves, was to take effect within the State, and that the slaves were made the legatees of their own freedom. On this account, and for this reason, the bequest was held to be void. Chief J. Chilton of that Court, when speaking of this case, in the subsequent case of Atwood's Heirs vs. Beck, adm'r, (21 Ala. 612,) says: "In Butler's will, the slaves were declared free in this State, and provision was made, if they could not remain in the State in that condition, for their removal, while in the will before us, the

slaves are to continue such in this State, and the executors are their owners, but for the purpose of taking them to a free State, where they may enjoy their freedom."

So, in this case, if it could be shown that the testator intended that the slaves should take their freedom in the State; but if not allowed to have it here, then they should be removed, the bequest might in like manner be held illegal. The view which I take of the matter, it will be seen, obviates this difficulty. That reasonable view takes the will as a whole, and construes it to mean, that the slaves shall be emancipated, if that emancipation be compatible with, or in other words, not opposed to the policy of the State at the time of the testator's death; and that if it were so opposed to the policy of the law, his executors should send them out of the State of Georgia.

I see no difficulty in finding words of manumission in this latter direction. As was shown by my learned colleague, in the first case between these parties, (16 Ga. R. 496,) no form of words, and no particular act, is necessary in order to effect manumission. Whatever is intended to express a withdrawal of the master's dominion over the slave, amounts to manumission, where manumission is in any way permitted. Such an act, appears to be a direction by a testator, that his executors shall send his slaves out of the State, wherever they may select a home.

A practical objection was urged, growing out of the difficulty of a selection being thus made by the slaves. The rule suggested by the Court below, was reasonable, viz: that a selection should be made by a majority of the slaves, and this should be adopted by the executors. But this is really only a question of inconvenience. It would be possible for the executors to send these slaves to separate and distinct places, as these were selected by different individuals of them; and it might be possible that one or more would not select any place. In such event, he, she or they would remain in a state of servitude to the heirs.

I can see no force in the objection, when applied to a case

like that before us, (which was also pressed in the case of Baker's Will, 6 Port. 269,) to the effect, that a slave has no capacity to choose servitude or freedom; and therefore, emancipation cannot be effected by leaving to him such selection.

This objection has its foundation in the proposition which we find in the case last cited, viz: that "it is essential to every gift, that there should be a donor, a donee, and a thing given, and that the donee must have capacity to take and hold;" and that a slave has no such capacity. But this proceeds upon the idea, that the manumission is to take effect within the State. If the slave be freed by being sent out of the State, into a State where he may have his freedom, there is certainly no difficulty as to a donee, &c.

Undoubtedly the master has the legal capacity to direct that his slave shall be sent abroad to be manumitted, if there be no law forbidding it. If so, and he direct that his slave shall be manumitted, by choosing some free State into which he shall be sent by his (the master's) means, the only question of capacity which relates to the slave is, whether or not he has capacity to desire to be sent to some such country, and to articulate that desire. It is, then, the master's capacity of manumitting, which takes effect through the selection of the slave, of the place to which he will be sent, and through the act of sending him there. This it is which determines his condition, and not his legal capacity to determine anything.

One of my colleagues suggested a difficulty, by asking, what was the status of the slave, who was, by the will, directed to be sent into a free country, during the period elapsing between the death of testator and the slave's removal? And further, if he had a right to freedom, or to be sent out of the State by virtue of the will, how could that right be enforced, and by whom?

The reply which occurs to me is, in the first place, that the condition of the slave during such period, would be that of a slave whom, by virtue of the directions in the testator's will, the executor had the right to send out of the country into a state of freedom. If he remained, he would be a slave still.

If he were sent into a land of freedom, he would be free. The Civil Law, I believe, applied the term statu liber to such a person.

In answer to the second branch of the question, I reply, that the slave's right in the premises, is not the thing to be ascertained, or which determines the legal duty of the executor. It is the executor's right. And though the slave may have no legal right in the premises, by reason of his legal incapacity, and no remedy for such rights as he may have, still, if, by the law of the testator's will, the executor has the right to send him out of the country, he may, in this way, of course, be legally emancipated. At all events, if the executor in such a case do send him out of the country, no one can gain-say him.

The executor's right and duty in the premises, are prescribed by the law of the testor's will. Where there is no municipal law forbidding it, the testator can certainly make such a law for himself in his will, and the same reason exists why the executor should carry it into effect, as why he should erect a monument or tombstone of specified character and cost, if so directed by the testator's will. It will not be disputed, I suppose, that if such directions were given by a testator, it would be the duty of his executor to carry them into effect, (especially if they were reasonable,) and that he would be sustained by a Court of Justice in so doing, or instructed so to do by a Court of Equity, if he asked instructions on this head. Yet, it could not be said that the tombstone had any right in the premises, or perhaps, that any remedy lay against the executors, by which the erection of the stone could be enforced.

I have said that the executor's right and duty in such a case is prescribed by the law of the testator's will. There should not be a doubt, it seems to me, that the testator has the right to make this his will. In his lifetime, he could have sent as many of his slaves as he pleased into a free country. If so, why can not he direct that they shall be taken there after his death? Why not, unless the law prohi-

bits it, as well send them into a foreign country, as to give them to A or B?

In the case above cited, of Atwood's Heirs vs. Beck, Ch. J. Chilton on this subject, says: "It cannot, for a moment be questioned, but that Atwood, while living, could have made the same disposition of his property which he directs his executors to make. He might have removed the slaves in person, or by his agent, and there is no law forbidding it. Who is the executor? He is but the representative of his testator, and is influenced by his will to do what he desires, if such desires be lawful. The testator, as respects his lawful desires, &c. still lives in the executor, in legal contemplation." (Pow. on Dev. 150.)

If, then, by the law of the testator's will, the executor has the right to send the slave out of the State, the practical question is determined, and it matters not what are the slave's rights, or his means of enforcing them. And when the slave is so sent into a free State, he is emancipated.

It was urged, on the part of the Counsel for the plaintiffs in error, and is maintained by my brother Benning, that such removal of slaves from our State, is contrary to the laws of the State, and to its policy.

Governor McDonald argued, I believe, that the Act of 1818 did not forbid manumission, by sending slaves out of the State, but the Act of 1801 and the policy of the State did. Now, it is very clear, to my mind, that neither of these Acts inhibit such manumission.

The Act of 1801 declares, that "The said slave or slaves, so manumitted and set free, contrary to the true meaning and intent of this Act, shall be still, to all intents and purposes, as much in a state of slavery as before they were manumitted and set free by the party or parties so offending." The application of such a provision to slaves sent out of the State, and into a free country, would have been quite absurd. And it is not reasonable to suppose, that if the Legislature, when passing this Act, had had in mind slaves so sent into the free States, or to any foreign country where slavery did.

not exist, they would have thus left the matter, and not have drawn a distinction which might have relieved them from the imputation of intending to enact so vain a thing. The emancipation contemplated by the Act must, therefore, have been manumission within the State.

The Act of 1818, referring to slaves who may be the subjects of intended manumission in the wills, deeds, &c. which it has in contemplation, declares that "each and every slave or slaves in whose behalf such will or deed shall have been made, shall be liable to be arrested by a warrant, under the hand and seal of any Magistrate of this State; and being thereof convicted, shall be liable to be sold as a slave or slaves." Of course these terms refer to emancipation within the State, for they contemplate an arrest of the slave by a Magistrate of the State, and a sale into slavery in the State. In the preamble of the Act, too, language is employed which shows the same thing.

What the law of our State is, and was intended to be, these Statutes thus clearly show, as I think; and unless the policy of a law is to be sought and found outside of the law itself, and of what it was intended to enact, (as I have elsewhere suggested in a decision on this subject,) I do not see that it can properly be said that emancipation of slaves, by sending them out of the State, is contrary to the policy of our law.

But as I have elsewhere said, and as has been remarked by my brother LUMPKIN in the first case between these parties, this point has been so often decided by our Courts, that it might very properly be considered as not now an open question in our State.

As to what may be the true and sound policy of the State in this regard, without reference to existing laws, that is another question—a question for the Legislature, and one which, like an edged tool, as it is, should be handled very carefully.

I have no difficulty in recognizing that as a bad policy, which sends slaves into the 'free States of this Union, where they serve to swell the numbers of that wretched and thrift-

less throng of free negroes, who, themselves the subjects of suffering, without sympathy from their abolition neighbors, are yet contributing to the agitation which engenders so much fanatical sympathy for their contented and happy kindred in slavery. But whilst I recognize this as impolitic, I am not prepared to admit, as a question of political economy, that the number of slaves in our State should never be diminished, by such manumission as sends them to Liberia or some foreign land.

To determine a policy for a great State, reference must be had to the future time, as well as to the present; and he who will give himself the trouble to look into the statistics of the slave-holding States for the last fifty years, will find some important facts, which should cause him to pause before deciding that no slaves should ever be emancipated, by being sent out of our State. This judgment is not the proper place for such details, and I refrain from mentioning them.

There are other reasons, founded in humanity, which eloquently protest against the proposition, that under no circumstances, should slaves be sent to freedom in a foreign land; and may well cause the legislator to hesitate before declaring this to be the law. In view of these, I am not yet satisfied that such should be the law. Some of these reasons are readily suggested by the circumstances of this case—circumstances which teach us a sorrowful lesson of human nature and its infirmities, and should cause all to be thankful, who have not the occasion which this testator had to invoke for their relief, the humane policy of the State.

Benning, J. dissenting.

I dissent from the judgment rendered by the Court in this case.

I think that this part of the third item of the will, "on account of the faithful services of my body servant, William, (the husband of Peggy,) I will and desire his emancipation, with the future issue and increase of all the females mentioned in this item of my will," is void. And I think so for the same reasons for which I thought the will of Bledsoe void. Those reasons I have stated in my dissenting opinion in the Bledsoe will cases, which were before this Court at Milledge-rille, in May, 1855. (18 Ga. R.) It is needless, therefore, to repeat the reasons here.

I may remark, however, that I do not think that the effect of the invalidity of the part of the will aforesaid, was such as to render the whole will void. The rest of the will I consider good; i. e. all of the rest that is disconnected from this part.

This opinion I owe to a more careful consideration of the second section of the Act of 1801, which prohibits manumission, than that which I gave to the section when investigating the questions in the Bledsoe will cases. The section is in these words: "The third section of the said Act, hereinbefore referred to, shall be construed to inhibit the recording only of so much of any instrument (as is hereinbefore described) as shall relate to the manumitting or setting free of any slave or slaves." (Pr. Dig. 795.)

At the same time, I must still admit that I see much in the rest of the Act, that favors the notion that this part of the will is not only void itself, but renders the rest of the will void.

No. 11.—F. Phinizy and another, adm'rs, &c. plaintiffs in error, vs. Selina A. Few, defendant in error.

[1.] A testator bequeathed to his married daughter, in trust, for her sole and separate use, certain negroes, naming them; and if she died without child or children, born of her body and living at her death, in that case, the property was to revert to his estate and be equally divided between certain grand-children: Held, 1st. That the will created an executory devise in favor of the grand-children. 2ndly. That the executory devisees might elect either to take the property bought with the proceeds of that originally bequeathed to them, or assert and enforce their lien upon the same in a Court of Equity, for the fund so expended. 3dly. That notice to a purchaser of the property thus acquired, before the payment of the money, would bind him to the same extent and in the same manner, as the trustee from whom he bought; and 4thly. That this incumbrance upon the title, would constitute a good defence, either at Law or in Equity, against the payment of the purchase money.

Assumpsit, &c. in Clark Superior Court. Tried before Judge Jackson, February Term, 1855.

The following items appeared in the will of Thomas Carr, deceaseds

9th. I give and bequeath unto my son, William A. Carr, and Col. Nicholas Ware, in trust, (who I hereby constitute and appoint trustees for the purposes herein named,) the following negroes, for the sole use, benefit and behoof of my daughter, Selina A. Few, wife of Col. Ignatius A. Few; viz: Lett and her children, Sarah, Laneaster, and Cornelia; also Ben and his wife Else, with their future increase; these negroes to be hired out, and the money arising from their labor to be paid by my said trustees to my said daughter, Selina, free from the control of her said husband, Col. Ignatius A. Rew.

11th. All the rest and residue of my estate, both real and personal, not herein disposed of, I will, and bequeath, and devise in the following manner, viz: one half thereof to my grand-children—the children of my daughter, Susan B. Ware—to them, their heirs and assigns, forever, to be equally vided amongst the whole of them, share and share alike. The

other half I give unto my son, William A. Carr and Col. Nicholas Ware, in trust, for the sole use and benefit of my lovely daughter, Selina A. Few, free from the control of her husband. Col. Ignatius A. Few, to be by my aforcsaid trustees vested in bank stock or some other productive fund, and the increase arising therefrom to be paid to my said daughter annually. And such other negroes as may fall to her lot or share, to be disposed of in the same manner as is prescribed for Lett and her children. And should my said daughter, Selina A. Few, survive her said husband, Col. Ignatius A. Few, then and in that case, the trust herein created in my son, William and Col. Ware, shall cease; and the property, both real and personal, so bequeathed in trust, shall vest in my said daughter Selina, and be then delivered in her full possession by my said trustees: Provided, nevertheless, that if my said daughter Selina die without a child or children, born of her body and living at the time of her death, then and in that case the said negroes and other property, real and personal, so herein bequeathed, shall revert to my estate, and be thereafter equally divided among the children of my son, William A. Carr, and my daughter, Susan B. Ware, share and share alike."

In 1839, Carr was removed as trustee, and Graves appointed. In 1843, Graves was removed, and Col. Few appointed. In 1845. Col. Few died.

In 1850, Mrs. Few sold to Jacob Phinizy a house and lot in Athens, and the contract was reduced to writing, by which she bound herself to make to Phinizy "good and sufficient titles" to the same; and he was to pay her \$1800 therefor. She afterwards tendered him a warranty deed, which he refused, on the ground that he had been notified by Carr that his children had an interest in remainder in the premises. She then sued Phinizy on the contract; and upon the trial of that cause, the questions arose now brought up for review.

It was in evidence that Mrs. Lew paid for the lot herself. A deed was made to one half of it in Col. Few's lifetime,

It was also in evidence that she to him, as trustee for her. paid for the building of the house. It was admitted that Col. Few, as trustee, collected from Carr \$600, and that Graves, as trustee, paid over \$500, which went into Mrs. Few's pos-After the death of Thomas Carr, the Government of the U.S. granted to his heirs a large quantity of Alabama lands, which William A. Carr, as executor, sold, and invested Mrs. Few's share in rail road stock and a negro Isaac. negro Isaac was afterwards sold. Carr, as trustee, turned over to Graves 42 shares of rail road stock and six negroes, viz: Ben, Letty, Jacob, Sarah, Sam and Isaac. had no property now, except the five negroes and this house Col. Few died insolvent—no administration on his estate. The rail road stock was transferred to Emory College by Graves. Carr, as guardian for his children, has given notice to the rail road company, and also to Emory College, that they would follow the stock at Mrs. Few's death. Col. Few said to Mrs. Few, in his last illness, "here is a house and lot purchased with your own money."

Counsel for Phinizy requested the Court to charge-

- 1. That if the Jury believed, from the evidence, that the land in question was purchased with the *corpus* or principal of the estate held by Col. Few, in trust for his wife, that then the rights of the executory devisees attach on the property, and the plaintiff cannot recover.
- 2. That although the lot may have been purchased with the income of said trust estate, yet, if said estate has been diminished by the plaintiff since it came into her possession, or by her trustee, with her consent, that then the executory devisees have the right to have said property (though bought with income) substituted in place of the principal so parted with to the value thereof; and the plaintiff, if such are the facts, cannot recover.
- 3. That if they believe that a part of the land is subject to the claim of the executory devisees after Mrs. Few's death, that the defendant cannot be compelled to take the remainder, and the plaintiff cannot recover.

4. That if the Jury were in doubt as to the facts on which the offered title was based, that they must find for defendants.

The Court declined so to charge, but charged the Jury as follows:

That in the view taken by the Court, it was unneccessary to charge on these points; that the trust estate, created by the will of Thomas Carr, was only for the purpose of protecting the property bequeathed to Mrs. Few from the power and liabilities of her husband, and that it ceased to exist at the death of Col. Few; that the claim of the executory devisees only attached on the property bequeathed in the will, and that unless the property in question was a portion of the identical property bequeathed in the will of Thomas Carr, Mrs. Few had a right to convey it, free from the executory devise.

To this charge and refusal to charge, defendants below (the administrators of Phinizy,) excepted; and these decisions are assigned as error.

COBB & HULL, for plaintiff in error.

T. R. R. COBB, for defendant in error.

By the Court.—LUMPKIN, J. delivering the opinion.

[1.] Was the Court right in holding, and so charging the Jury, that the claim of the executory devisees, under the will of Thomas Carr, deceased, attached only on the original property bequeathed in the will; and that unless the property in question was a portion of the indentical corpus bequeathed in the will of Thomas Oarr, Mrs. Few had a right to convey, free from the executory devise?

That the executory devisees might maintain an action against Mrs. Few for the waste of this trust property, we have no doubt. But is this their only remedy? May they not elect to take as a substitute, the property purchased with the proceeds of that bequeathed by the will? Upon the

plainest principles of equity, we are clear that they have this right. Suppose, however, that this were not so, and that the executory devisees have a lien only on the property so substituted for the money expended, cannot this lien be asserted and enforced? No good reason has been given why it cannot. None occurs to this Court. A testator, by his will, often encumbers a legacy with an annuity or some other burden. The legatee and those claiming under him, with notice, take cum onere—why may not Equity enforce this as well as a vendor's lien?

Whether the executory devises, therefore, had an equitable title to the house and lot, or a lien upon it merely, for the amount of the trust fund expended upon it, the result is the same. It is an incumbrance upon the title; and Phinizy, receiving notice before the purchase money was paid, is entitled to protection, either in a Court of Law or Equity. (Wharton's Hill on Trustees, marg. p. 165, and Notes.)

Whether the property in dispute was or was not bought with the trust funds, we deem it unnecessary to inquire, inasmuch as this fact was wholly withdrawn from the consideration of the Jury by the charge of the Court. If there was any evidence that this property was purchased, wholly or in part, with the projects of that originally bequeathed by Col. Carr, the plaintiff in error is entitled to a reversal of the judgment. The deed made to Col. Few as trustee, is some proof, however insuffi-The proceeds of the boy Isaac, went into the cient of itself. hands of Mrs. Few, and may have gone to the payment of this property. But whether this boy falls within the executory devise in the will, will depend upon the future proof to be made in the case. The Alabama lands, it is true, were sold by Wm. A. Carr, as executor of his father, and the money was invested in Isaac and rail road stock. But if these lands were granted by the Government, directly to the heirs of Col. Thomas Carr, subsequent to his death, then this fund could not be followed and affected by the trust in the will.

We decide nothing, of course, upon this point.

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Gregory vs. Waters.

No. 12.—John M. Gregory, plaintiff in error, vs. Thomas G. Waters, defendant in error.

[1.] In answer to a rule against a Sheriff, for not having levied a fi. fa. upon the property of M, one of the parties defendant to said fi. fa. pursuant to instructions from the Counsel for the plaintiff, that officer returned that he had failed to execute the fi. fa. upon the assurance of R J, agent for the original plaintiff in execution; that the same had been settled by M, but by mistake, this had not been entered, and that R J had taken the fi. fa. and made an entry to this effect upon the execution: Hild, that inasmuch as the record showed that the fi. fa. had been assigned to another person than the original plaintiff, for whom R J was agent, it was the duty of the Sheriff to know that R J had no authority to control the execution; that R J's instructions were no protection to him, and that he was liable upon the rule.

Motion, in Floyd Superior Court. Decision by Judge TRIPPE, June Term, 1855.

John M. Gregory, as the assignee of a fi. fa. in favor of Robert H. Johnson vs. Samuel J. Stevens, principal, and Daniel R. Mitchell indorser, placed the same in the hands of Thomas G. Waters, Sheriff of Floyd County. To a rule to show cause why he should not pay over the money thereon, the Sheriff returned, among other things, that "Mitchell told him that the fi. fa. was settled so far as he was concerned; that he went with Mitchell to Johnson, the plaintiff in fi. fa. who confirmed this statement, and said that it was to be transferred without recourse on Mitchell, and was so understood at the time, and that he had neglected to insert it in the transfer."

The Court below held this return to be sufficient, and this decision is assigned as error.

PRINTUP, for plaintiff in error.

T. W. ALEXANDER, for defendant in error.

Gregory vs. Waters.

By the Court.—STABNES, J. delivering the opinion.

[1.] This Sheriff's return is deficient, because it shows that he failed to execute the fi. fa. upon the assurance of William Johnson, (who had been agent for Robert H. Johnson, the plaintiff in fi. fa. in controlling the execution;) that it had been settled, as to Daniel B. Mitchell, and upon the entry having been made to this effect by Mr. Johnson on the execution. This was done after the fi. fa. had been assigned, and after the Attorney for the assignee had given the Sheriff notice to make the money out of Mr. Mitchell.

Such a return is not sufficient to relieve the Sheriff from liability. He had the fi. fa. in his hands, with the assignment on it. He had the opportunity of knowing that another than Mr. Johnson controlled it, and he had no right to act upon the information of Mr. Johnson, nor to permit the latter to make any entry upon the fi. fa.

He took the responsibility of acting on the information which he received from Mr. Johnson, and he must stand to the consequences.

It is said that if the return be not true, it might be traversed. There is nothing, however, to traverse, except the Sheriff's statement of what William Johnson said. And this is not sufficient to exonerate him from liability.

It may be true, that it was understood, at the time of the assignment between the parties, that Mr. Mitchell was to be released, and that a settlement had been made with Mm; and the Sheriff, in his return, states that Mr. Johnson said it was true, and that it was by his neglect that it was not so entered. But if this was the case, it should have been distinctly set forth, and the Sheriff should have rested his defence upon it. As it is, he represents himself as acting entirely upon the ipse dixit of Mr. Johnson, which was no authority to him.

The return may be amended, when the case goes back, if

Printup vs. Johnson.

the above fact be true, and the Sheriff can make his defence accordingly.

Judgment reversed.

No. 13.—Daniel S. Printup, plaintiff in error, vs. Riley G. Johnson, defendant in error.

[1.] P accepts a bill of exchange, drawn on him by W & W, under an agreement that certain property of theirs, which he has in his hands, shall be applied to the payment of the acceptance. P pays the acceptance out of his own funds. After the acceptance, J levies an attachment against W & W, on the same property: *Held*, that the property is to be applied to the re-imbursement of P, before it can be applied to the payment of the attachment debt.

In Equity, in Floyd Superior Court. Decision by Judge TRIPPE, June Term, 1855.

This was a bill filed by Daniel S. Printup, to enforce a factor's lien, upon the following state of facts charged:

In February, 1854, Watters & Walker of Charleston drew a bill of exchange at 30 days on Printup, for \$4.000; that Printup had, at that time, and still in his possession, as the property of the drawers, a negro man named Prior; and also several town lots in Rome, and some other claims; that he accepted the bill on condition that said property should be subject to the payment of said draft, this condition being inserted in the written acceptance of the bill; that not being able to realize anything on this property before the bill fell due, he was forced to pay the same out of his own funds; all of which was still unpaid by Watters & Walker, except about \$1.200. Subsequently, Riley G. Johnson sued out an at-

Printup vs. Johnson.

tachment against Watters & Walker, and had the same levied on the said negro and town lots, and was proceeding to obtain judgment against the same; that he would thereby deprive Printup of the benefit on his lien, by agreement, on this property; and Watters & Walker being entirely insolvent, the prayer was for an injunction.

On demurrer, the Court dismissed this bill. This decision is assigned as error.

PRINTUP, for plaintiff in error.

T. W. ALEXANDER, for defendant in error.

By the Court.—Benning, J, delivering the opinion.

The bill of complaint has, in reference to the acceptance, this statement: "which was indorsed" (understood?) "and agreed should be paid out of proceeds of said property, and that said property was held by your orator for that purpose."

The acceptance itself seems, too, to have been made with reference to such an agreement as that indicated by this statement in the bill. The terms of the acceptance are very special; they are as follows: "The within draft, accepted and to be paid only on condition that a negro man named Prior, a carpenter by trade, and a town lot No. 38, Etowah division of Rome, and two lots of land, Nos. 232 and 197, of 4th section of originally Cherokee, now Floyd, and all other claims and property now in my hands, belonging to Watters & Walker, shall be subject to payment thereof. Feb. 11th, 1854.

It appears from the bill, that the acceptor, Printup, was, at the time of the acceptance, in the possession of the negro and the lands.

From all this and some other matters stated in the bill, it is a fair inference, that the complainant meant it to be understood that the agreement aforesaid, by which the negro and

Printup vs. Johnson.

lands were to be applied to the payment of the acceptance, was made at or before the time of the acceptance; and therefore, made before the levy of the attachment. At any rate, such is the inference of this Court.

[1.] But if that agreement was made before the levy of the attachment, it gave to Printup a lien on the property, which had a priority over the lien on the same property, which the attachment gave to Johnson, the plaintiff in the attachment. Can there be a doubt of this? See Kollock et al. vs. Jackson, (5 Ga. R. 154.)

And perhaps Printup would have had this priority of lien, even if there had been no such express agreement, provided he had the property in possession at the time of the acceptance, and made the acceptance on the understanding (one usually to be implied in such cases between acceptor and drawer,) that the property was to be subjected to the payment of the acceptance. (Chitty on Bills, 347.)

It was, however, objected to the agreement, that it was not in writing; and therefore, that it was void as to the land, by the Statute of Frauds.

The bill is silent as to whether the agreement was in writing or not-

If the agreement was such a one that it was required to be in writing by the Statute of Frauds, then it is to be presumed, until the contrary be shown, that the agreement was in writing; for it is, in general, to be presumed, until something to the contrary be shown, that no man does what the law forbids, or what the law declares shall be invalid.

The consequence is, that if the bill be true, the property ought to be first applied to the re-imbursement of Printup, and what remains of it after his re-imbursement, if any remains, to the payment of the attachment debt.

This was the right of Printup. And this was a right which, it is manifest, he could not make available without the aid of a Court of Equity.

The conclusion therefore is, that the Court below ought not to have over-ruled the demurrer.

Conyers vs. Hamilton

No. 14.—B. H. Convers, plaintiff in error, vs. Thomas Hamilton, defendant.

[1.] Where sundry lots of land are sold by number, and in the bond for titles, one is twice inserted, by mistake, and another omitted, for want of the title paper to describe it, Equity will not restrain the collection of the purchase money, where the vendor acknowledges the error, and is ready to rectify it and to execute a conveyance for the lots which were actually sold.

In Equity, in Cass Superior Court. Decision by Judge TRIPPE.

This was a bill praying an injunction against an action at law, on the following statement of facts:

That in 1851 the complainant, Bennett H. Conyers, had purchased from Thomas Hamilton a large real estate, for which he took a bond for titles, and gave two notes, each for 13.000 dollars; that the estate, at the time of the contract, was understood and stated to be twenty-six lots, of forty acres each, and that the price was twenty-five dollars per acre; that afterwards, Convers discovered that the bond really embraced but twenty-five lots—the number of one lot (No. 738) being written twice; that on discovering said error, he went to Hamilton and called his attention to it, who admitted that it was a mistake; and taking the bond, erased from it the said No. 738, in one of the places where it was written: that at the same time, Hamilton took one of the notes and made on it the following entry, in his presence: "February The principal of this note is reduced by the sum of one thousand, in consequence of the correction of an error in the bond for titles, in which 738 as the number of a lot. was inadvertently twice written down."

The bill charged that afterwards, and when Conyers was not present, said Hamilton took said note and added to the above entry thereon the following words: "but is to continue so reduced only till disinterested men shall have decided that there should be such a reduction, for such an error."

Conyers vs. Hamilton.

That Hamilton had subsequently brought suit on said note, and Conyers having tendered to him the whole amount claimed to be due, except said one thousand dollars, filed this bill, praying a perpetual injunction, &c.

The answer of defendant admitted the facts, except that he denied any contract to furnish a certain number of lots or acres, and asserted that the sale was of the settlement of land as a whole, and for an aggregate price. He admitted, however, that it was understood by both parties, that the land was rated at twenty-five dollars per acre. He alleged, moreover, that one of the lots which was included in the purchase, was not named in the bond, because they did not know its number; but that it was understood, at the time, to be omitted for that reason, and to have been sold along with the others; that if this lot had been inserted in the bond, it would have made the right number of acres.

The answer admitted the entry on the note, and its subsequent alteration by the defendant, and alleged that he had the right to make such alteration, on the ground that the entry was made without consideration, and not binding on him.

On the coming in of the above answer, the defendant moved to dissolve the injunction and to dismiss the bill. On which, the Court retained the bill, but dissolved the injunction.

To which order, dissolving the injunction, complainant excepted.

AKIN, represented by Hull, for plaintiff in error.

UNDERWOOD, represented by WRIGHT, for defendant.

By the Court.—LUMPKIN, J. delivering the opinion.

[1.] We think the injunction in this case should have been dissolved. Twenty-six 40 acre lots were sold, making 1040 acres, which, at \$25 per acre, amounted to \$26.000. One of the lots was mentioned twice, and one was omitted to be inserted at the time the bond was executed, for want of the

deed, which had not been taken out of the Clerk's office. And this is the whole case. Mr. Conyers refuses to pay for this forty acre lot, while Dr. Hamilton is willing to make him a title to it. We cannot see any equity in this.

No. 15.—James E. Buntyne, adm'r, &c. vs. William H. R. Stone and another.

- [1.] One of two subscribing witnesses to a bill of sale, for the purpose of carfying the same to record, made affidavit "that he saw the subscribing witness subscribe his name to the within bill of sale, and acknowledged for the within purposes:" Hetd, that the construction of such an affidavit is, that he saw the witness attest the acknowledgment made by the maker of the deed.
- [2.] Where the complainant has an adequate and sufficient remedy at Common Law, a demurrer to the bill, on this ground, should be sustained.
- [3.] Where a bill sets forth the fact, that one of the distributees of an estate had released his interest in said estate, "merely for the purpose of making himself a competent witness" for the administrator, in a case brought for the recovery of slaves; and also alleges that such distributee is fraudulently combining with the administrator to recover these slaves, but does not allege that the release was not legal and in good faith made, nor that it was fraudulent and void: Held, that such released distributee could not properly be made a party to the bill.

In Equity, in Walton Superior Court. Decision by Judge Jackson, at Chambers, November 30th, 1854.

William H. R. Stone and Thomas S. A. Stone, filed their bill in Walton Superior Court, alleging the following facts: That on 8th May, 1816, Thomas Stone purchased of William T. Hay, then of Jasper County, a negro woman and her two children, and took a bill of sale to them, attested by two witnesses; that on 16th November, 1816, one of the witnesses

made the following informal affidavit, before Spencer Cone, J. I. C. of said County of Jasper, viz: "Georgia, Jasper County: Personally appeared before me John McAlister, and being duly sworn saith, that he saw the subscribing witness subscribe his name to the within bill of sale, and acknowledged for the within purposes." Upon this probate, it was recorded, on the same day, and the original has since been In the same year, Hay went off to the State of Tennessee, and was there murdered. Hay left three sisters, one of whom married David Johnson, and all of whom lived in this State, and were able to take out administration on his estate had they desired it. Thomas Stone then had possession of the negroes, claiming them as his own, and continued in possession, (selling one of them and using the proceeds,) till his death, in 1850, living near the said sisters of Wm. T. Hay and their husbands, all of them needing the property if it was theirs, and two of them being very poor; and yet, none of them making any claim whatever to the said negroes, or the proceeds of the one sold. Thomas Stone, by his will, bequeathed the negroes to the complainants. In 185-, James E. Buntyne, who intermarried with one of the daughters of David Johnson, procured letters of administration upon the estate of said Hay, for the fraudulent purpose of recovering these negroes; and David Johnson, combining with him in this fraudulent purpose, released all of his interest in said estate to his children, merely for the purpose of making himself a competent witness in the case. Buntyne, as administrator, commenced suits against the complainants for the negroes, and relied solely upon the testimony of Johnson, who swore to admissions of Thomas Stone, which, from the length of time and the death of Thomas Stone, it was impossible for complainants to contradict. Hay left no debts at the time of his decease. The bill farther charged, that it was now pretended that William T. Hay was a minor when the bill of sale was made; and in order to establish this, said Johnson had destroyed the record of his age, which appeared in the family Bible.

The prayer was for the establishment of a copy of the lost bill of sale, if the Court held the probate to be insufficient; and for the perpetual injunction of the suits at Law by the administrator.

A demurrer was filed to this bill—1st. For the improper joinder of David Johnson as a party. 2d. For want of equity. The Court over-ruled the last ground, and defendants excepted. The Court sustained the first ground and ordered the bill dismissed, as to Johnson, and complainants excepted.

Defendant, Buntyne, as administrator, then filed his answer as follows, and moved to dissolve the injunction:

He admitted the death of Hay, and that the negroes were in the possession of Thomas Stone at the time; but he insisted that he procured possession through David Johnson, and under the pretence that he wanted the woman to cook for him, he being the step-father of Hay and his sisters, and that it was only by permission of one of Hay's sisters that he thus got possession, which he was to retain until Johnson called for a re-delivery of them. He denied that Stone set up any claim whatever to them. He admitted that Stone kept possession of them as long as he lived, but insisted that he set up no claim to them, but always acknowledged the rights of Hay's sisters. He admitted the sale, by Stone, of one of the negroes, but insisted that he said that he would account for the money, the proceeds of the sale. Defendant did not admit or deny the execution of the bill of sale, but insisted, that if made at all, it was simply intended as a power of attorney, to enable Stone to sell the negroes for Hay. answer insisted that Hay was a minor when the paper was executed; denied the fraudulent destruction of the evidence in the Bible; denied all fraudulent combination with Johnson, and insisted that the release made by him was in good faith. It admitted the ability of the parties to take out administration, and averred that their reason for not so doing, was their confidence in the statements of Thomas Stone.

The Court refused to dissolve the injunction, and defendants excepted.

Both parties assigned error on the exceptions filed by them.

COBB & HULL, for Buntyne.

T. R. R. Cobb, for Stone.

By the Court.—STARNES, J. delivering the opinion.

[1.] The bill of sale from Hay to Stone, was admitted to record upon the affidavit of John McAlister, one of the two subscribing witnesses, who swore "that he saw the subscribing witness subscribe his name to the within bill of sale, and acknowledged for the within purposes."

It has been thought doubtful whether, according to this phraseology, the witness refers to an acknowledgment by the other witness or by the grantor; and the bill in this case prayed for a construction, by the Court, of this affidavit.

It is our opinion that an acknowledgment of having signed the instrument by the maker of the deed, was meant. The phraseology is very informal, and was, no doubt, the work of an uneducated person. But the meaning seems to be determined by the fact, that there was nothing for the other witness to acknowledge. McAlister says that he saw him subscribe his name to the instrument. The acknowledgment, then, could only have been by the maker. And such, we hold, is the construction to be placed upon it.

- [2.] We think, therefore, that the Court erred in over-ruling this demurrer—
- 1. Because that the allegations of the bill show a documentary title to the slaves in question, which is not deficient on account of irregularity in the probate of the bill of sale, and of which it is our opinion that the defendants might have availed themselves, in defence of the Common Law action.
 - 2. Because they set forth such facts as, uncontroverted, appear to show that title to the slaves in question vested in Thomas Stone, by virtue of the Statute of Limitations of our

Eaton vs. Yarborough, &c.

State; and this, too, we think might have been relied upon in the Common Law action.

- 3. Because the facts relied upon as presenting an equitable bar, by reason of the lapse of time, and all other grounds for equitable interposition, which are set forth in said bill, are such as may be set up successfully as pleas to the Common Law action.
- [3.] The Court below was right, in our opinion, in dismissing the bill as to David Johnson. According to the case made by that bill, he had relinquished all interest in the estate of Wm. T. Hay. It is true, the bill alleges that Johnson was fraudulently combining with Buntyne to recover these slaves; but it does not state that he had not executed a legal and bona fide release. On the contrary, it alleges that he had executed a release, merely for the purpose of making himself a competent witness. Of course, if he had made himself a competent witness, he had released his interest; and if he had released his interest, he should not have been made a party.

If it was intended to rely upon the fact that his release was a sham and a fraud, this should have been distinctly alleged and assigned as a reason why he was made a party.

Judgment reversed.

No. 16.—John S. Eaton, plaintiff in error, vs. Nathan Yar-Borough, adm'r of Bulter, defendant in error.

^[1.] The maker of a promissory note, which was barred by the Statute of Limitations, upon its being presented to him for payment, acknowledged that it was a just debt, that it ought to have, been paid long before, and

Eaton vs. Yarborough, &c.

gave a new promise to pay it when he finished a church which he was then building: *Held*, that the promissor referred to the completion of the church by him as a time of payment, and not as a condition upon which only the note was to be paid.

Assumpsit, &c. in Floyd Superior Court. Tried before Judge TRIPPE, June Term, 1855.

This suit was upon a promissory note. The defendant's intestate had been declared a bankrupt under the law of 1842. Plaintiff relied upon a new promise, which was as follows: "Defendant's intestate said it was a just debt; that it ought to have been paid long before; that plaintiff had been kind to him, and that he would pay it as soon as he finished the Methodist Church, which he was then building in Rome; and requested witness to bring the note back when he returned from North Carolina, that he might pay it." Defendant's intestate died before the Methodist Church was finished. It was completed before suit brought.

The Court charged that this was a conditional promise, and that the plaintiff could not recover.

This decision is assigned as error.

PRINTUP, for plaintiff in error.

T. W. ALEXANDER, for defendant in error.

By the Court.—STARNES, J. delivering the opinion.

[1.] We think that the Court was mistaken in holding that the new promise in this case, was made only upon condition that the defendant's intestate completed the building of the church upon which he was engaged.

In our opinion, the reference to the church by defendant's intestate, was for the purpose of specifying a time of payment, and not as a condition upon the occurring of which, only, the money was to be paid. In such case, his death be-

Chambers, Jeffers & Co. vs. Sloan, Hawkins & Co.

fore the completion of the church, (which has been finished,) does not exonerate his estate from liability.

Let the judgment be reversed.

No. 17.—Chambers, Jeffers & Co. plaintiffs in error, vs. Sloan, Hawkins & Co. defendants in error.

[1.] In an attachment, the affidavit was, that C J & W, partners, using the name of C J & Co. were indebted, &c. and that the said C J & Co. reside out of this State, &c.: Held, that the affidavit was sufficiently certain.

Attachment, in Floyd Superior Court. Decision by Judge TRIPPE, June Term, 1855.

The affidavit, to obtain an attachment in this case, stated, "that James S. Chambers, Henry L. Jeffers & John B. Wynn, merchants and partners, trading under and using the name and style of Chambers, Jeffers & Co. are justly indebted to deponent in the sum of \$5.460, 340, besides interest; and that the said Chambers, Jeffers & Co. reside out of this State, so that the ordinary process of law cannot be served upon them."

A motion was made to dismiss the attachment, because the affidavit did not state that the individuals constituting the firm of Chambers, Jeffers & Co. resided out of this State.

The Court over-ruled the motion, and this decision is assigned as error.

PRINTUP, for plaintiff in error.

T. W. ALEXANDER, for defendant in error.

Hooper & Mitchell vs. Memphis Br. &c.

By the Court.—Benning, J. delivering the opinion.

A partnership is two or more persons who occupy towards each other the relation of partners. It is not a being distinct from the members, which compose it. In this respect, a partnership differs from a corporation. When, therefore, a partnership is spoken of by its partnership name, and said to reside or not to reside in any place, the meaning, it is to be presumed, is that the members composing the partnership, reside or do not reside in the place.

If so, the affidavit in this case was sufficiently certain; and the Court below was right in holding that it was.

- No. 18.—Hooper & Mitchell, plaintiffs in error, vs. The Memphis Br. Rail Road & Steamboat Company, defendants in error.
- [1.] The fact that a case has been pending for four years in the Court, is no reason why a continuance should not be granted, provided, a proper showing be made, it not appearing that the delay was at the instance of the party applying for the continuance.
- [2.] Admitting that an Attorney has a general lien upon an execution in his hands for fees due him by the plaintiff, that lien does not extend to the judgment.

Motion, in Floyd Superior Court. Decision by Judge TRIPPE, June Term, 1855.

Messrs. Hooper & Mitchell, as Attorneys of Joseph J. Printup, obtained a judgment against the R. R. & Steamboat Co. for \$6.735. They gave notice in writing, to the defendant, of their claim for fees in that case, as well as for a gen-

Hooper & Mitchell vs. Memphis Br. &c.

eral balance of fees. Subsequently, the defendant in fi. fa. paid the whole amount thereof to D. S. Printup, as Attorney for Joseph J. Printup in whose hands the fi. fa. was. This was a motion to re-open the fi. fa. for the amount of their fees in this case, as well as for \$300, the amount of two fees in two other causes which had been settled by the parties. The Court ordered the fi. fa. re-opened for the fees in that case, but refused the rule as to the balance. This refusal is assigned as error by Hooper & Mitchell.

The Memphis Branch R. R. & Steamboat Co. also sued out a bill of exceptions on various grounds; but the only one considered by the Supreme Court, was the motion for a continuance, on the following grounds:

1st. Because the original bill of injunction, enjoining the proceeding of the f. fa. which was sought, by the rule of Hooper & Mitchell's Attorney, to be opened for their fees, was lost or mislaid, it being important in the hearing of this cause, in order to show that Hooper & Mitchell abandoned the causes upon the filing of this bill of injunction.

2dly. Because defendants, and the Attorney for defendants, had only within the last three days previous to the hearing, come within the knowledge of testimony which would clearly show that Daniel R. Mitchell, of the said firm of Hooper & Mitchell, had positively agreed, about the time said suits were commenced, to attend to them for Printup without charge, which facts were unknown to defendants or their Attorneys, until within three days of the hearing; and then too late to have the testimony which could have been shown by Achilles D. Shackelford, Esqr. who resides in Gordon County.

The Court would hear no showing, and ordered the cause to proceed.

This refusal to continue, is assigned as error by the said R. R. & Steamboat Co.

PRINTUP, for R. R. & Steamboat Co.

WRIGHT, for Hooper & Mitchell.

Baker, Wilcox & Co. vs. Wimpee et al.

By the Court.—LUMPKIN, J. delivering the opinion.

- [1.] We hold that the continuance asked for should have been granted. It was refused because the case had already been in Court four years. But it does not appear that this delay was attributable to the company. It is fair to presume that it was kept there by consent. It became important to ascertain whether the agreement set up by Printup, to defeat the fee of Hooper & Mitchell, was really made. One witness, Smith, swears it was; and the application for a continuance was made in order to obtain the testimony of Col. Shackelford, to prove the same fact. Opportunity should have been allowed for this purpose.
- [2.] Whether the decision was right in No. 27, depends upon the fact of whether or not Hooper & Mitchell's professional employment, in the covenant case, continued after judgment. The proof is clear, that it did not. Consequently, they had no lien on the execution in the covenant case, for the fees claimed by them in the other two cases.

- No. 19.—Baker, Wilcox & Co. plaintiffs in error, vs. Wil-LIAM WIMPEE and others, defendants in error.
- [1.] In cases of partnership, the equity of separate creditors, will never be enforced to take away or control a right acquired by legal execution, on the part of joint creditors, against the separate estate. And it is only when the legal recourse of the joint creditor against the separate estate is terminated, and he has no claim against these assests, except in Equity, as in cases of death, bankruptcy of a partner, &c. that the joint creditors are postponed.

Rule, in Cass Superior Court. Decision by Judge TRIPPE, June Term, 1855.

Baker, Wilcox & Co. vs. Wimpee et al.

This was a motion to distribute money in the hands of the Sheriff, arising from the sale of the individual property of William Wimpee. There were fi. fas. against Wimpee, individually, and also fi. fas. vs. Wimpee & Price, of an older date. The Court passed the following order:

"The parties in interest in this rule having agreed that the balance in the hands of the Sheriff be distributed among the fi. fas. in the same way and manner as though a bill had been filed to settle their conflicting claims: Ordered, that the money be applied to the fi. fas. against Wimpee, individually, and that the fi. fas. against Wimpee & Price be postponed."

This decision is assigned as error.

PRINTUP, for plaintiff in error.

T. W. ALEXANDER, for defendant in error.

By the Court.—STARNES, J. delivering the opinion.

[1.] The case of Cleghorn vs. The Insurance Bank of Columbus, (9 Ga. 319,) is decisive of the point made in the case before us. The whole subject is there fully discussed by my learned colleague, Judge LUMPKIN, and I need not do more than refer to it, for the reasons which influence us in reversing the judgment of the Court below, in this case.

It is in that case shown, that whatever may have been held as to the power of a Court of Equity to restrain a joint creditor from proceeding against the separate estate of a partner, the equity in favor of separate creditors will never be enforced to control or take away a right acquired by legal execution on the part of joint creditors against the separate estate. And that it is only when the legal recourse of the joint creditors against the separate estate is terminated, and they have no claim against these assets except in Equity, as in cases of

Smith vs. The City C. Rome.

bankruptcy, death, &c. of a partner, that the joint creditors are postponed. It is added, that "this is agreed to be the law, even in those Courts which recognize the rule," that the joint creditors are to be postponed to the separate creditors in such a case.

In the case now before us, the plaintiffs in error are enforcing their lien in a Court of Law, and have not voluntarily come into a Court of Equity for this purpose. They have been, it is true, (by the agreement, that "the case should be decided as though a bill had been filed to settle the conflicting claims,") as it were brought here by a bill in Equity; but of course they are so drawn into a Court of Equity, with all the legal rights which they had previously acquired; which legal rights were sufficient for their purpose. Their legal recourse had not terminated when they were thus drawn into Equity; and therefore, as we have just seen, they should not be postponed to the separate creditors of Wimpee.

Judgment reversed.

No. 20.—WILLIAM R. SMITH, plaintiff in error, vs. THE CITY COUNCIL OF ROME, defendant in error.

^[1.] A gift of the right of way, is not a gift of the earth and other materials which may exist within the boundary lines of the way, the right of which is given.

^[2.] It is almost a matter of course to grant an injunction to stay waste.

Application for injunction. Decision by Judge TRIPPE, at Chambers, 27th June, 1855.

Wm. R. Smith prayed an injunction on the following facts: He was the owner of a parcel of land within the corporate vol. xx-12

Smith vs. The City C. Rome.

limits of the City of Rome, upon which lot there is a valuable stone quarry, worth \$3.000, upon the bank of Etowah River; also a valuable sand bank, worth \$1.000; and the piece of land is also of great value as a residence, viz: \$2.500. The Mayor & Council of Rome quarried large quantities of rock from the said land, removed trees therefrom, and thereby caused irreparable injury to the lot. The bill alleged that Rome was a growing city, and that the value of this quarry was increasing rapidly, and would be very great; that a part of the rock is limestone, and will be immensely valuable for burning of lime; that there is also a ferry landing on this lot, which communicates with valuable land on the opposite side of the river, and that the said corporation is destroying the usefulness of the said ferry landing. The bill prayed for an injunction.

The Mayor & Council answered, that upon the application of complainant, they had laid out two streets over his land, and declared the same public streets; that they have only cut down these streets so as to make them level and passable; and in so doing have used the rock for macadamizing some of the streets of the city, and building a few culverts; that the sand bank alluded to, is in the street. The value of the property was admitted, but the damage done denied; and especially, that it was irreparable.

The Court refused the injunction, and this decision is assigned as error.

WRIGHT, for plaintiff in error.

T. W. ALEXANDER, for defendant in error.

By the Court.—Benning, J. delivering the opinion.

In this case, we assume that the answer is true.

The answer says, in substance, that the complainant gaveto the defendant the right to open two public streets through his land; that the defendant, in the exercise of this right, Smith vs. The City C. Rome.

opened the two streets; that a "high rocky bluff" projects itself a part of the way across the track of one of the streets; that the defendant took from this bluff, at a point within the boundaries of the street, some rock, and used the rock in macadamizing the streets of Rome and in building culverts; and that the defendant claims the right, thus, to take and use such of the rock as is within the boundaries of the street.

The first question therefore is, whether the defendant has this right?

The gift, by the complainant to the defendant, was that of the right of way over his land. It was no more than that.

Is a gift of the right of way a gift of the earth, rock, trees, and other materials which may happen to exist within the boundaries of the way? Is a gift of the right of way a gift of all the gold that may exist beneath the surface of the way, the right to which is given?

In Goodtitle ex dem. Chester vs. Acker and Elmes, (1 Burr. 143,) Lord Mansfield said: "1 Ro. Abr. 392, Letter B. Pl. 1, 2, is express, 'that the King has nothing but the passage for himself and his people; but the freshold and all profits belong to the owner of the soil.' So do all the trees upon it and mines under it (which may be extremely valuable.) The owner may carry water in pipes under it. The owner may get his soil discharged of this servitude or easement of a way over it, by a writ of ad quod damnum."

And in Lade vs. Shepherd, (2 Str. 1004,) which was an action by the owner for trespass done by the appropriation of a part of a street which he had laid out on his land, the Court say, "It is certainly a deduction to the public, so far as the public has occasion for it, which is only for a right of passage. But it never was understood as a transfer of the absolute property in the soil."

To the same effect is 2 Inst. 705. (See Woolvych on Ways, 5.)

[1.] A gift, then, of the right of way, is not a gift of the earth and other materials that may exist within the boundary lines of the way, the right of which is given.

Smith vs. The City C. Rome.

It follows that the defendant did not have the right to take rock from "the rocky bluff" aforesaid, to be applied to the macadamizing of the streets of Rome, and to the building of culverts. The defendant, no doubt, has the right to level the bluff, so as to make the street passable the whole width of it. In the right to make the street, is implied the right to do this. The defendant having the right to make the street, has a right to do every thing requisite to the making of the street. And this is the limit of the defendant's right. The fragments of rock that might result from the process of levelling the bluff, would belong, not to the defendant, the owner of no more than the right of way, but to the complainant, the owner of the soil.

The next and only other question is, whether the complainant had the right to an injunction to stop the defendant from taking rock from "the rocky bluff" aforesaid, and applying it to the uses of the City of Rome in macadamizing streets and building culverts?

[2.] And we think he had. Taking rock for the purpose of applying it to the uses aforesaid, would amount to the commission of waste. (Com. Dig. Wast. (D. 4.) And an injunction to stay waste, has become almost a matter of course. (Moore vs. Ferrell et al. 1 Kelly, 11; Eden. on Inj. 198, -'9.)

We think, therefore, that an injunction to prevent the defendant from taking the rock, to be applied to the uses aforesaid, should have been granted. Mayor & C. Rome vs. Duke.

No. 21.—THE MAYOR & COUNCIL OF ROME, plaintiffs in error, vs. DAVID D. DUKE, defendant in error.

Before a judgment of the Circuit Court will be reversed, the burden is
upon the party complaining to show, affirmatively, that it was erroneous.

Mandamus. Decision by Judge TRIPPE, at Chambers, June 26, 1855.

David D. Duke applied for a mandamus, to compel the City Council of Rome to grant him a license to retail spirituous liquors. In his petition, he alleged that he had complied with the city ordinances, in every respect, and that they refused to grant him a license.

The City Council responded that the applicant had not complied with the ordinances; and if he had, they insisted that they had full discretion to grant or refuse a license to any one they may see proper; and that the applicant was unworthy to have such a license.

The Court granted a mandamus absolute, and this decision is assigned as error.

UNDERWOOD, represented by Hull, for plaintiffs in error.

WRIGHT and PRINTUP, for defendant in error.

By the Court.—LUMPKIN, J. delivering the opinion.

[1.] We are called upon to reverse a judgment made upon an Ordinance of the City of Rome, without having the ordinance before us. We cannot assume that responsibility. The council may be clothed with discretionary power to grant or withhold a license. If so, the fact should have been made to appear. Upon one point we are clear, namely: That an ordinance, like a statute, should operate uniformly. And

Rogers vs. Fort et al.

that the council had no right to make the applicant's case an exception. Unless the authority to discriminate is conferred by the charter, all who bring themselves within the provisions of the ordinance, are entitled to its privileges.

No. 22.—Job Rogers, plaintiff in error, vs. Wm. A. Fort et al. defendants.

[1.] Whenever an executor commits a breach of trust, and another person takes advantage of the *devastavit*, knowing that the executor is not proceeding according to the terms of the will, such complicity will authorize those interested in the estate to hold the purchaser liable.

In Equity, in Floyd Superior Court. Decision on demurrer, by Judge TRIPPE.

This was a bill filed by the heirs and legatees of Zachariah. B. Hargreves, setting forth, that in 1839, said Hargreves had sold to Job Rogers a large estate in Cass County, for the sum of 36.000 dollars. The sake was consummated, and Rogers took possession of the estate, giving Hargreves four promissory notes for the aggregate sum above stated. Shortly afterwards, Hargreves died, leaving his widow, Malinda Hargreves, executrix, and James M. Spullock executor, of his last will and testament.

Said will commenced in the following words (after naming his executors): "I have confided to them all the authority which I, by law, possessed over the control of my own property; they are authorized to make all contracts; to execute all instruments in writing, in fulfilment thereof, which my estate may seem to require."

In another item were the following words: "Having sold

Rogers vs. Fort et al.

to Job Rogers real estate to a considerable amount, it is my .desire that as much indulgence be extended to him in the payment therefor, as may be considered for the interest of my estate."

The bill went on to charge, that Rogers being related by marriage to Mrs. Hargroves, partly by his influence over her and partly by threats, that he would sell his property and leave the State, and thereby defeat the collection of said debt against him, in fraud of the rights of the creditors and legatees, induced the said executors to rescind the sale of said land, which had much declined in value in the meantime, and to give him, moreover, the sum of six thousand dollars to rescind it. The executors afterwards sold the estate for 10.000 dollars.

The bill further charged, that the executor and executrix were both insolvent, and prayed that Rogers might be decreed to account for the amount of said notes, (less the amount for which the estate had been sebsequently sold,) with interest; and also for said sum of six thousand dollars, which he had received for rescinding said sale.

The bill was demurred to for want of Equity, and also because said executor and executrix were not made parties.

The Court ordered that the bill be amended, by making them parties defendant, and over-ruled the demurrer for want of equity.

To which decision, over-ruling the demurrer, the defend-

UNDERWOOD, represented by HULL, for plaintiff in error.

WRIGHT, for defendants.

By the Court.—Starnes, J. delivering the opinion.

We are of opinion that the allegations of this bill do not constitute a charge of legal fraud against Job Rogers, or of

Rogers vs. Fort et al.

duress practiced by him, in operating on the affections of his sister-in-law, Mrs. Hargroves, or the fears of Mr. Spullock.

For myself, I have experienced some difficulty in agreeing that the charges of this bill clearly enough set forth such acts as make Rogers responsible for a devastavit, by the executors. And as the case goes back, I would suggest that these charges be made more distinct, by amendment, if the facts authorize it. But my brethren are clearly of the opinion, that these allegations show, that by reason of the influences practiced by Rogers on the executor and executrix, they did what they had no right to do; what was not for the best interest of the estate; and therefore, that which they did amounted to a devastavit. It is thought that the charges of the bill show a complicity on the part of Rogers, with the acts of Spullock and Mrs. Hargroves, or a taking advantage of those acts, knowing that they were wrong.

Whenever an executor commits a breach of trust, and another person takes advantage of the devastavit, knowing that the executor is not proceeding according to the terms of the will, such complicity will authorize those interested in the estate to hold the purchaser liable. (McLeod vs. Drummond, 14 Ves. 355; Andrews vs. Wrigley, 4 Bro. Ch. R. 125; Keane vs. Roberts, 4 Madd. 357; Ram. on Assets, Ch. 37, \$4, pp. 491, 492; Adair vs. Shaw, 1 Sch. & L. 261; 1 Story's Eq. 580, 581.)

Judgment affirmed.

- No. 23.—The Gov. ex rel. G. B. HAYGOOD, adm'r, &c. plaintiff in error, vs. The Justices of the Inferior Court of Clark County, defendants in error.
- [1.] There was a petition for a mandamus to be directed to the Inferior Court, requiring that Court to indemnify the Sheriff out of the county treasury, for a loss he had sustained by the escape from jail of a prisoner, confined therein under a ca. sa.—an escape, the opportunity for which was supplied by the insufficiency of the jail. The petition did not show whether the Inferior Court had, at or before the escape, power over such a fund as would have enabled it to render the jail sufficient. The petition was dismissed:

 Held, that the petition was properly dismissed.

Mandamus, in Clark Superior Court. Decision by Judge Jackson, at Chambers, 6th September, 1855.

Green B. Haygood, as the administrator of James Hendon, petitioned for a mandamus nisi, against the Justices of the Inferior Court of Clark County, upon the following state of facts:

In August, 1848, Older Neal obtained a judgment, in Clark Superior Court, against Haygood, as the administrator of Hendon, former Sheriff of said county, for the sum of \$3219 49, on account of the escape of John Totty, a defendant in ca. sa. from the common jail of said county. The petition showed that the escape was effected without the negligence, default or misconduct of Hendon or his Jailor, but wholly on account of the insufficiency of the jail; that, by law, he was compelled there to confine the defendant in ca. sa. and that the duty of providing and keeping in repair a safe and sufficient jail, was devolved, by law, upon the Justices of the Inferior Court of said county, at the expense and charge of the county; that the said Court were therefore liable to indemnify the Sheriff for the loss thus incurred by the insufficiency of the jail; that he had applied to the said Court for an order on the County Treasurer for the amount paid out

by him, to be paid out of such funds as were or might thereafter come into the treasury, not otherwise appropriated for the ordinary and necessary county purposes, which application they refused to consider or to grant.

Upon this petition a mandamus nisi was granted, on 14th July, 1854.

In the return of the Justices to this mandamus, they insisted among other things—1st. That the demand of the petitioner was barred by lapse of time. 2d. That in 1849, the relator applied for a mandamus on the same grounds, which was refused by the presiding Judge, and that he was consequently barred. It was admitted, at the hearing, that this refusal was on the ground that relator had an action at Law, which remedy he afterwards tried, and was finally cast in by the decision of the Supreme Court, that it was not the proper remedy.

A motion was made to dismiss the mandamus nisi, on the ground that the relator was not entitled to relief upon the facts stated. At the same time, the sufficiency of the above return was argued before the presiding Judge.

He decided that the returns were insufficient, and defendants excepted.

He also sustained the motion to dismiss the mandamus, and relator excepted.

Each party assigned error upon these exceptions.

T. R. R. Cobb, for relator.

COBB & HULL; PEEPLES, for Inferior Court.

By the Court.—Benning, J. delivering the opinion.

[1.] Ought the mandamus to have been dismissed?

The argument of the side which says no to this question, may, I think, be stated as follows:

1. The damage to the relator's testator, was occasioned by the escape.

- 2. The escape would not have happened, if the jail had been sufficient.
- 3. The jail would have been sufficient, if the Inferior Court had not been guilty of neglect.
- 4. For a neglect in the Inferior Court, which occasions damage to an individual, the people of the county, and not the members of the Inferior Court, are liable.
- 5. For such a neglect, the people of the county may be sued by a suit against the Inferior Court; for the Inferior Court is a corporation, and one which represents the county; or the county is, itself, a corporation, by the name of the Inferior Court.

The third proposition in this argument cannot be admitted. It may never have been in the power of the Inferior Court to make the jail sufficient. That Court may never have had the money necessary to the making of the jail sufficient. But if it never had, then that the jail was not sufficient, cannot be imputed into neglect in the Court.

Whether the Inferior Court ever had the necessary money or not, does not appear. Nothing appears, from which any inference can be drawn, as to what was the state of the county treasury at or before the time of the escape; nothing from which any inference may be drawn as to what were the uses which the Inferior Court had for money; as to what were the calls that existed for county expenditure.

And it is not in the power of the Inferior Court to replenish, at will, the county treasury. That treasury gets its main supplies from county taxation; and no county tax can be laid by the Inferior Court, "unless two thirds of the Grand Jury of the county shall first recommend the same at a regular term of the Superior Court." (Cobb's Dig. 184.)

But unless it appeared that the Inferior Court had the money required for making the jail sufficient, it is to be presumed that it had not that money; for it is to be presumed, until the contrary be shown, that every public officer does his duty. It is to be presumed, therefore, that if the Court

had had the money, it would have used it, and so, have made the jail sufficient.

And of this opinion is the whole Court.

It follows, that as things stand, the proposition, that "the jail would have been sufficient if the Inferior Court had not been guilty of neglect," cannot be received as true.

But unless this proposition can be received as true, there is, manifestly, no case for a mandamus. And therefore, the judgment of the Court below dismissing the mandamus, must have been right.

This is the conclusion to which this Court come. But besides the reason just given, there is another which also operates on me individually—a reason of far greater breadth and depth.

This petition for a mandamus, is substantially a suit, not against the Inferior Court, but against the county. It is conceded, by the Counsel for the petition, that the members of the Inferior Court, in their private capacities, are not liable. But if they are not liable in their private capacities, then, in my opinion, nobody is liable. The people of the county, I think, are neither directly nor indirectly liable.

I believe that there is not to be found a decision of any Court, whose decisions are entitled to be considered precedents for this Court, to the effect that a county is liable in a case of this sort. In Russell and others vs. The Men of Devon, (2 D. & E. 661,) the "experiment," whether, in such a case, the people of a county are liable, was tried, and the experiment failed.

And why should the people of the county be liable, in such a case, assuming now the case to be such as the argument for the mandamus represents it to be, viz: a case in which the damage is to be imputed to the neglect of the Inferior Court?

Is it because the Inferior Court is the agent of the people of the county? It is of the essence of an agency, that the agent hold his office at the will of the principal—that the agent be under the absolute control of the principal. But

the members of the Inferior Court hold their office, not at the will of the people of the county, but for a term of years fixed by law. Nor are they at all under the control of the people of the county. No. It is the people of the State of whom the Inferior Court is the agent. It is they who provided for the Court when they made their Constitution; it is they whose Governor commissions its members; it is they, to each and all of whom its services are due; it is they who, in their sovereign capacity, can dismiss its members from office; or, at will, control them whilst in office.

But even if the Inferior Court were the agent of the county; still, in my opinion, the county would not be liable for the misconduct of that Court. A county is a corporation of the municipal kind, or it is not a corporation of any kind. If it is a municipal corporation, it is not liable for the misconduct of the Inferior Court, though that may be its agent; for it is a principal not denied in the discussion of this case, that a municipal corporation is not liable for the acts or omissions of its officers.

If a county is not a corporation of any kind, still less can it be liable for the misconduct of the Inferior Court; for in that case, it cannot have an agent or an officer—it cannot be a principal. In that case, it is not a person of any sort. If a county is not an artificial person, it is no person at all; for, manifestly, it is not a natural person.

But if I did not think this were so; if I thought that a county is a corporation, and one that is liable for the misconduct of its agents, I could not agree that it may be sued for their misconduct by a suit brought against the very agent guilty of the misconduct. I should have to insist that the suit should be brought in some other way. If it is possible to hold that the Inferior Court may be the agent of the county for some purposes—purposes specially pointed out by express law, such as holding Courts and keeping in good condition court-houses and jails, it is not, I hardly think, possible to hold that it is the agent of the county for all purposes; or, indeed, the agent for any other purpose than one which

is expressly designated by law. It is not expressly said, by any law, that the county shall be sued by a suit brought against the Inferior Court as the county's agent.

Finally: In any view of the case, is mandamus the remedy? Does mandamus lie against any sort of a party, to compel the payment of unliquidated damages—to compel the payment of so much as a Jury may, at some time after the granting of the mandamus assess? I think not. And that, I take it, is the object of this suit. It is true, that the amount which the Sheriff had to pay for the escape of the person who was confined under the ca. sa. appears; but there also appears enough to satisfy me that that person was insolvent; and if he was, the amount which the Sheriff paid, is not the measure of the damages which the county would have to pay, if it should have to pay any amount at all. (16 Ga. R. 423.)

I waive the question whether, under any circumstances, a judgment against one party can be taken as a liquidation of the damages which may be due from another party.

No. 24.—John Epps, plaintiff in error, vs. The State of Georgia.

- [1.] It is better that trials before triors, to test the competency of a Juros, should, as in all other cases, be conducted publicly; still, they are not restricted to this mode only.
- [2.] Where a Juror has been set down as disqualified, from a misapprehension of his answer, it is competent for the Court to correct the mistake, whenever it is discovered, and restore the Juror to the panel.
- [3.] It is the right of the Court, either in civil or criminal cases, to propound any questions to the witnesses, which it may see fit, during the progress of the trial.
- [4.] In cases of doubt, character is essential; and in all such cases, should

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preponderate in favor of innocence, especially where life is involved. But where the charge is positively proved, it cannot avail.

- [5.] If one makes an attack upon the person or premises of another, with intent to kill; and the gun of the assailant is accidentally discharged in the struggle, and the life of the other destroyed, it is murder.
- [6.] To be of a Jury, in case of felony, one must have resided six months in the county, previous to the trial; a challenge, however, for want of qualification, in this respect, must be made before the Juror is sworn.
- [7.] A casual remark, made to or by a Juror to another person, in the presence of the Court, is not of itself, necessarily suggestive of such an irregularity as will set aside the verdict.
- [8.] Proof by a single witness, of the formation and expression of an opinion by a Juror against the defendant, will not be sufficient to impeach the verdict—the Juror himself having previously denied the fact, on oath, in his examination before the triors.

Indictment for murder, in Clark Superior Court. Tried before Judge Jackson, August Term, 1855.

Defendant moved for a new trial in this stated case, on the following grounds:

1st. That the Court allowed the two triors, being Jurymen sworn to try the cause, to take out Benjamin Jones and other persons who were declared incompetent to try the case, and to converse with said persons in private.

2d. That the Judge said, in presence of a full panel of Jurors, that it was a strange thing that a man should have a decided opinion without having heard the testimony in the case.

3d. That the Court erred in his charge to the triors in the case of John Hawkins, a Juror who stated, in answer to question, that his opinion was now fixed and decided, provided the reports are true; that he had heard that the defendant had shot his father at his own house, and his opinion was, that he ought to be hung, and that he would give the defendant a fair trial. As to this Juror, prisoner's Counsel requested the Court to charge the triors, in arriving at the influence of a previously expressed opinion on the mind of a Juror, the triors must judge for themselves, from the opinion expressed, and their knowledge of human nature, and not from what

the Juror, himself, may say as to its influence upon his mind; which charge the Court declined to give. Second. That the fact that the Juror formed his opinion from a portion, only, of the facts, is no reason why he is competent, provided his opinion is fixed. Upon which last request the Court charged, that an opinion, to disqualify, must be based on some of the facts or circumstances; and that the triors were to judge from the portion of the facts which the Juror heard, whether or not his opinion could deter him from giving the prisoner a fair trial.

The triors returned the Juror competent, and the prisoner challenged him.

4th. That the Court erred in reference to Frances M. Blackman, a Juror who was put on triors, and being understood to answer that he had formed and expressed a decided opioion, was sit down for cause by Mr. Cobb, prisoner's Counsel, as many other Jurors, giving similar answers, had been sit down, by a kind of tacit consent with Solic-The Solicitor General then announced that itor General. the panel was exhausted; the Clerk stated that there were only three others on the new panel, when the Court said he was informed that Mr. Blackman was misunderstood in his answer; that he had answered he had formed no opinion whatever; whereas, he had been understood to answer that he had formed and expressed a decided opinion. placed him again on the triors, and he was pronounced competent, and was challenged by prisoner.

5th. That the Court erred, after the Solicitor General had asked the first question of Sanford Roberts, one of the State's witnesses, in taking the examination of said witness out of the hands of the Solicitor General and examining said witness himself.

6th. That the Court erred in declining to charge the Jury as requested in the words requested (in writing); that is, "that in a case where there is but one witness to the immediate facts of the killing, as in this case, then the previous

peaceable and good character of the prisoner is, of itself, sufficient to raise a reasonable doubt of his guilt.

7th. That the Court erred in charging the Jury, that if the prisoner went to the house of the deceased with the intention of killing him, and broke down the door for the purpose of killing him; and in breaking down the door, the gun went off accidentally and killed deceased, the prisoner is guilty of murder; whereas, there was no evidence to warrant such charge. Because James Dee, one of the Jurors who tried the cause, was not a competent Juror, not having resided in said county but four months before the trial; which fact was unknown to the prisoner and his Counsel, until after said Juror was sworn to try the case.

9th. That Joseph M. Williams conversed with William Wood and another Juror, in the Court house, after they were sworn as Jurors to try the case.

10th. That John C. Benedict, one of the Jurors who tried said case, who was put upon triors, and denied before them having ever formed or expressed any opinion as to this case, and was by them decided to be competent, had previously formed and expressed a decided opinion, unfavorable to the prisoner; which fact was unknown to the prisoner or his Counsel until after the verdict was rendered in said case.

In support of the motion, the following affidavits were filed:

GEORGIA, CLARKE COUNTY:

Personally appeared, Anderson W. Reese, who being duly sworn, says, that after a portion of the Jury were sworn in the case of The State vs. John Epps, on his trial for murder in Clark Superior Court, at August Term, 1855, he, deponent, saw persons conversing with the Jury; and more especially did he see Joseph M. Williams of said county, holding such conversation with William Wood, one of said Jury.

ANDERSON W. REESE.

Sworn to and subscribed before me, in open Court, August 30, 1855.

John Calvin Johnson,

Clerk S. C. Clark County, Georgia.

VOL. XIX-14

THE STATE

vs.

John Epps.

Murder.

Personally appeared, in open Court, Thomas R. R. Cobb, Howell Cobb, William H. Hull and C. Peeples, Counsel for defendant, who being duly sworn, saith, at the trial, James Dee was taken and sworn as a Juror in the above case; they were not aware of the fact that the said Dee had resided in this county only four months; that he was put upon triors at the instance of defendant, and found competent.

HOWELL COBB, THOS. R. R. COBB, WILLIAM H. HULL, C. PEEPLES.

Sworn and subscribed in open Court, August 20th, 1855.

Asa M. Jackson,
Ordinary Clarke County, Georgia.

The above stated Counsel farther state, on oath, that they had no knowledge or intimation that the Juror, Benedict, had formed and expressed an opinion as to this case, until after the verdict was rendered.

THOS. R. COBB,

HOWELL COBB, WM. H. HULL.

Sworn and subscribed in open Court, August 20th, 1855.

John Calvin Johnson,

Clerk S. C. Clarke County, Georgia.

THE STATE vs. JOHN EPPS.

In open Court appeared John Epps, who, on oath, saith that he was not aware that James Dee was not a citizen of this county; and consequently, not qualified to act as a Juror, until after the verdict was returned by the Jury.

JOHN EPPS.

4

Sworn to and subscribed before me, August 20th, 1855.

Asa M. Jackson,
Ordinary Clarke County, Georgia.

GEORGIA, CLARKE COUNTY:

Personally appeared, James Dee, who, on oath, saith that he has been a citizen of this county only four months; that he was one of the Jury that tried the case of The State vs.

John Epps, murder; that he formerly resided in this county and had his family here; that in the month of March, 1854, he moved away from this county, with the intention to remain, and carried his family with him; that his family, up to this time, remained away, and that he returned to this county to reside about four months ago; that he did not state these facts when sworn as a Juror.

JAMES DEE.

Sworn and subscribed before me this 20th of August, 1855.

John Calvin Johnson,

Clerk S. C. Clarke County, Georgia.

THE STATE VS.

JOHN EPPS.

Indictment for Murder, in Clarke Superior Court.

Personally appeared, in open Court, the defendant, John Epps, who, on oath, saith that he was not aware that John C. Benedict, one of the Jurors who sat on said case, had ever expressed any opinion with reference to this case, until he was sworn as a Juror in this case; that said Benedict was put upon triors by defendant, and before them denied having ever formed or expressed any opinion with regard to the case, and was declared by them to be competent, and was then accepted by defendant.

JOHN EPPS.

Sworn to and subscribed before me, this 20th Aug. 1855.

JOHN CALVIN JOHNSON,

Clerk S. C. Clarke Co. Ga.

STATE OF GEORGIA, CLARKE COUNTY:

Personally appeared before me, John Calvin Johnson, Cl'k Superior Court of said county, Francis W. Winfrey, who, being duly sworn, deposeth and saith, that in the months of May, June and July of the present year, he, as often as six times, (and he thinks eftener,) heard John C. Benedict, a

Juror in the case of The State vs. John Epps, murder, say "that if he ever should be on the Jury, he would hang John Epps, and that he ought to be hung."

F. W. WINFREY.

Sworn to and subscribed before me 8th day of Sept. 1855.

John Calvin Johnson,

Clerk S. C. Clarke Co.

GEORGIA, CLARKE COUNTY:

Walton H. Booth, of the County and State aforesaid, personally before me, on oath, says, that William Wood, one of the Jurors on the trial of John Epps, in Clarke Superior Court, at August Term, 1855, frequently said in his presence, shortly after the death of Thomas N. Epps, that if he was on the Jury for the trial of said John Epps, that he would go for hanging him, and would stay on the Jury until he "growed" to the bench, and that the said John Epps ought to be hung without a Jury.

WALTON H. BOOTH.

· Sworn and subscribed before me 8th Sept. 1855.

John Calvin Johnson, Clerk S. C. Clarke Co.

GEORGIA, CLARKE COUNTY:

Personally appeared Wilson Lumpkin Biggs, who, on oath, saith that he heard John C. Benedict, about three months agossay "that John Epps, the prisoner, ought to be hung; that if Epps was not hung, no man ought to be hung."

wilson Lumpkin ⋈ Biggs.

Sworn to and subscribed before me this 20th Aug. 1855.

John Calvin Johnson,

Clerk S. C. Clarke Co.

In over-ruling the motion for a new trial, the Court took up the several grounds *seriatim*, and disposed of them as follows:



109

In regard to the 1st ground, the Court said that he alallowed the triors (at first not Jurymen) to retire with the Juror upon his trial, under a practice recommended by the Supreme Court itself, after the Juror, upon trial, was asked such questions as the defendant's Counsel and the Solicitor General desired, in open Court. The Court said to the triors, they were at liberty to ask the Juror such questions as they wished, either in open Court, there, or retire with him up-stairs and ask them, which last was done by the triors in several instances. After the two first Jurymen were sworn, they became triors for the remaining panels; and asking for the same privilege, it was allowed them in the instance re-The Court is aware that, subsequently, the Supreme Court had recommended, as the better practice, that a case before triors should be conducted as a case ordinarily is in Court, but was not, and is not now aware, that to allow the triors to ask the Juror questions in private, has been determined by our Supreme Court to be erroneous. Court followed the ruling of the Supreme Court in both cases-1st. By allowing the Juror to be questioned by defendant's Counsel and the Solicitor General, and both to be fully heard before the triors, and then the charge of the Court upon the law; and 2d. After all this was done, by allowing the triors further, if they desired it, to examine the Juror (being the only witness) in private. The Court is of opinion that no harm was done or could be done, by this The triors, from the very nature of their duties, having to pass upon the competency of the Juror, must hear all he has heard of the case; and, so far as their minds as Jurymen could be affected by it, they would be as much affected if heard in open Court as if heard in private. first ground is, therefore, over-ruled. The second ground is over-ruled, the Court being utterly unable to see the slightest error in the remark, if made.

In regard to the 3d ground, the Court charged, distinctly, that the formation and expression of an opinion of a decided character, would disqualify a Juror; that they would

judge from all the Juror said formerly, and then from what he had heard about the case, as well as from their knowledge of human nature, whether he had formed and expressed such a decided opinion; if the opinion was decided, it was immaterial whether he had heard all or a portion of the facts from rumor. The Court is unable to see any error in refusing to charge in the exact words asked, or in charging as he did.

In regard to the 4th ground, the Court remarked, that he had to swear a great number of men to get a Jury in this cause—some five hundred men. In this long and tedious effort to get a Jury, the Jurors were often put rather informally upon the triors. Mr. Cobb, conducting the examination for defendant, on asking whether a decided opinion had been formed and expressed; and being answered in the affirmative, set down the Juror, the State acquiescing. When this Juror was thus set down, the Court was informed, by the Sheriff, that he had been misunderstood; that he answered "he had not formed and expressed an opinion." The Court directed him again to answer as to what he had said. He replied, "he had not formed and expressed an opinion."

The prisoner then challenged him. It is true he was the last man upon the panel, and the Court had asked the Clerk if he had another ready; but the panel had not been discharged, and the Juror had not left his seat; and the whole thing passed off rapidly, and in a moment or two. The Court can see no wrong to the defendant in it.

In reference to the 5th ground, the Court was taking down the testimony. The Solicitor General had told the witness to go on and relate what he knew about it. The witness talked too fast for the Court's ability to write, and he stopped the witness and then asked him to go on, saying to the witness as he would get down parts of the narrative, what then, what next? and perhaps putting other questions, with the view of getting the testimony fairly down. The Court is of the opinion that he has the right to ask any witness examined before him, any legal question he pleases, calculated to draw from the witness the truth, to shed light upon the

case, either for or against the prisoner. In this case, the Court thought the Solicitor General entirely competent to manage for the State, and did not interfere further than as above stated, and for the purpose mentioned; but if the Solicitor had omitted any question deemed by the Court important, he would have despised himself as a mere puppet, set up for a show, and not worthy to be a Judge, whose duty it is to ferret out truth and do justice, if he had not asked it.

In regard to the 6th ground, the Court declined to charge as requested, in the language requested, but charged that the peaceable character of the prisoner was a circumstance to which he was entitled, and a very strong circumstance, if there was but one witness, but diminishing in strength as that witness was corroborated by others. Whether it would raise a reasonable doubt or not, was for the Jury to determine from the credibility of the main witness and the other witnesses, the corroborating circumstances and all the evidence of the case. This Court thinks the charge given exactly right, and would not mislead the Jury by charging in the language requested.

In regard to the 7th, the Court charged the Jury, that if the prisoner went to the house of his father with intent to murder him, and finding the door closed, broke it down with the felonious intent to murder the old man when he got in; and if in the act of breaking the door down with that intent, as it flew open the gun was discharged, though unintentional, it was murder. In the opinion of this Court, that charge is the law, and fully authorized by the evidence. Indeed, one main point in the defence was, to reduce the crime to involuntary manslaughter; and it became necessary for the Court to instruct the Jury, fully, upon the law of manslaughter, and all the distinctions between it and murder, which was done with great fairness, if not liberality to the prisoner.

In regard to the 8th, if it had been made known to the Court that Dee had resided in the county but four months before the trial, he would have been rejected as incompetent; but on a motion for a new trial, the question is different. It

was competent for the prisoner to ask him how long he had resided in the county. They took him without asking him the question or inquiring as to the fact. I am inclined to think he was not even put upon triors, but am not certain as to that. It was certainly the prisoner's duty to have informed himself. He had vigilant Counsel, who could have known it. He lived in Athens where they lived. Independently of the strict letter of the law, he was the better Juror from his short residence, and the prisoner received no injury from his being on the Jury on account of his short residence. Nowing that a new trial is equivalent to an acquital, I decline to grant it on this ground, when no real injustice has been done.

In regard to the 9th. In the crowded state of the bar with a panel of 48 men in it, it is difficult to prevent talking to the Jury, a single remark being made to one of them. The defendant must show that the remark was made about thecase, and unfavorable to him, at least, before a new trial will be granted on this ground.

In this case, the Solicitor General proposed to file an affidavit on the part of the party charged, that he did not converse with the Juror, but the Court deemed it unnecessary. The defendant's Counsel contended that he did make a remark or two, but could not prove that anything improper was said.

In regard to the 10th ground, the affidavits of a young man named Biggs, produced to show the expression of opinion on the part of Benedict before the triors, swore he had expressed none; it was affidavit against affidavit; and the Court refused to grant a new trial on this ground. The Court gave defendant's Counsel until next day to produce other testimony they hoped to produce; they produced none, and the Court adjourned on Tuesday morning, being compelled to go to Walton. To-day two more affidavits are filed, one of which affects the same Juror, Benedict. This Court transmits them to the Supreme Court, to take such action thereon as that Court deems proper, simply remarking that the Solicitor General resides in Lawrenceville; has had no opportunity of getting counter affidavits, and the Juror, Benedict, no oppor-

tunity of being heard in his own defence, nor the other Juror now implicated. This Court is of the opinion that the case of murder was fully made out, and any impartial Jury would have rendered the same verdict. If a new trial, it will be impossible, in his opinion, to get another Jury to try the cause. With this remark, and with the consciousness of having discharged his painful duty to the country in the fear of God, he submits the whole matter to a higher and more learned tribunal, content to abide their judgment and obey their decision. The Court farther certified that it was to procure Winfrey's affidavit that time was desired and that Biggs swore, at that time, that Winfrey would swear what he has sworn.

The evidence was as follows:

PENELOPE S. EPPS: Thomas Epps, killed 25th July, 1854. in this county; prisoner is son of deceased; came to our house between 12 and 1 o'clock and cursed deceased, and went on and said he intended to kill him before sun-down that day. He picked up the chair and drawed the chair over him; told him the reason he was going to kill him; was because he was going to get Sam Gee to come there to live. Sam Gee married one of the sisters of witness. nothing else, except that if he killed him he would be satisfied; if they hung him the next minute he did'nt care. then went home and got his gun; lived not very far off; about as far as from here to Mr. Vincent's. He never done or said anything when he came, but broke the door down and shot him. Saw him as he was coming. Deceased shut the door. Deceased was standing in the door when he was shot; fell out of doors; it was a rifle gun; shot him in his left shoulder; died the same day; there was nary a word said to nary a one of them; there had not been any difficulty between them before that time; not lately; they had fusses in time—a right smart time; it might have been a year, and may be more; deceased told prisoner, at first, to go home and behave himself; he said a great deal to deceased.

he thought it was very hard; that he was going to fetch more, and if he did, one or the other of them would have to die; a year, or about that, before the accident; said he would live agreeable and peaceable if he would not bring any more of the dam family; that he drove all his sisters off; he knew that the old man had driven them off long ago; one was living at Joe Epp's and one at Mr. Adam's; Mary has been married three times; last husband is still alive; her first husband deserted her, several years before she married another.

Cross-examination: Saw John Epps between 9 and 10 o'clock the day it happened; Buck Shaw was with witness; John was in his shop; talked with Shaw, dunning him for an account; he did not talk with witness as he always did; witness does not know the cause of it; heard Shaw remarked on it before he left him; Epps always a mild, steady fellow, and never heard of his having any difficulty before in his life; been at gatherings at witness's house, when he was drinking; he usually went off to himself, and sat down by himself, and pestered nobody; when he was drinking could not tell well, unless he was close to him; was 20 yards off that morning; liquor made him quiet; said to Shaw he must be a drinking, or something was the matter with him.

Re-examined: John talked pretty fierce; seemed to be pestered—interrupted in his feelings or something.

ALLEN GRIFFITHS: Three or four years ago, as they went to Edward's sale, this lady was sitting at the fire; John said he did not know what might happen in the family; prisoner was always a peaceable, gentlemanly fellow; wife of old man, 17 or 18 years old when he married her; tolerable old man, 60 years old.

DR. MACON, cross-examined again: The ball passed through the suspender; the hole in the suspender was about an inch and a half below the wound; from the course of the ball the deceased must have been reaching out his arm when he was shot.

To the decision over-ruling the said motion for a new trial, the defendant excepted; and the same is assigned as error.

COBB & HULL; PERPLES; T. R. R. COBB, for plaintiff.

WRIGHT, representing Sol. General, for defendant.

By the Court.—LUMPKIN, J. delivering the opinion.

We propose to examine, briefly and in their order, the several grounds upon which the new trial was asked and refused in this case.

[1.] The first complaint is, that the triors were permitted to retire with the Juror who was challenged, in order to find whether or not he stood indifferent between the State and the defendant.

That challenges to the array were tried publicly, there can be no doubt. The practice in such case, was for the Clerk to state to the triors the cause of challenge; and after he had so done, to conclude thus: "and so your charge is, to inquire whether it be an impartial array or a favorable one"; and if the triors affirmed it, the Clerk entered underneath the challenge, affirmatur; but if the triors found it favorable, the entry was calumnia vera. (Trials per Pais, 165.)

The rule, however, as to the trial of challenges to the polls, seems not to be so well settled. Coke and Rolle are silent upon this subject, and a different practice seems to have obtained in the State Courts touching it. It is every where agreed that the truth of the matter alleged as cause of challenge, may be made out by witnesses; and also, that the Juror challenged may, on his voire dire, be asked such questions as will test the state of his feelings, provided they do not tend to bring the Juror into infamy and disgrace.

This Court suggested, as the better practice, that the trial be conducted in the presence of the Court. We are still of that opinion. We do not feel at liberty, however, to decide authoritatively, that this shall be done; especially as a contrary course had pretty generally obtained in the oldest Circuit Courts.

In this case, the presiding Judge seems to have blended the two modes. After the Juror challenged was asked such questions, in open Court, as the Solicitor General and the defendant's Counsel saw fit to propound, the triors were allowed to retire with the Juror, for further examination. think the practice objectionable. And the fact that the triors are officers of the Court, acting in a judicial capacity, and liable to be punished for any misdemeanor, does not obviate The privilege thus conceded, is liable to gross the difficulty. We have reason to know that it is often abused. Better that this, as well as all other trials, be conducted openly—publicly. It is one of the best safeguards of a sound and correct administration of justice.

- [2.] As to the remark which fell from the bench in the presence of a full panel of Jurors, that it was a strange thing that a man should have a decided opinion as to the guilt or innocence of the accused, without having heard the testimony in the case, we think it was incautious, and should not have been made, calculated, as it was, to intimidate the Jurors from that free and frank declaration, as to the state and condition of their minds, which it is the object of the examination to elicit. It does not appear, however, as it should do, that it resulted injuriously to the prisoner.
 - [3.] We see no error in the instructions given by the Court to the triors; nor in his refusal to charge them as requested. The law was stated correctly.
 - [4.] As to the fourth ground upon which the motion for new trial was made, in reference to Francis M. Blackman, it is neither more nor less than granting to the Juror the privilege of correcting a misapprehension as to his answer. Is it possible that such permission should be denied?
 - [5.] We know of no limit to the right which belongs to the Court, of interrogating witnesses, either in civil or criminal cases, especially the latter. The life or death of a manuary hang upon a full development of the truth. The presumption that this liberty will not be honorably and impartially exercised, is not to be tolerated for a moment. Counsel, in their

xeal to acquit their clients, seem to take it for granted that the only object of Courts is to convict. Until called upon to discharge the solemn and responsible functions of a Judge, they never can fully appreciate the high sense of obligation under which they act, to God and their fellow citizens. "Thy life for the murderer's life, if he escape," is the solemn denunciation of the Almighty! When they see, therefore, that a material fact has been omitted, which ought to be brought out, it is not only the right, but the duty of the presiding Judge, to call the attention of the witness to it, whether it makes for or against the prosecution; his aim being neither to punish the innocent nor screen the guilty, but to administer the law correctly. And let it be remembered, that Counsel seek only for their client's success; but the Judge must watch that justice triumphs!

[6.] The next error assigned is, that the Court declined to charge the Jury as requested in writing, "that in a case where there is but one witness to the immediate fact of killing, as in this case, then the previous peaceable and good character of the prisoner is, of itself, sufficient to raise a reasonable doubt of his guilt."

The first objection to this request is, that the proof did not warrant it. It is ingeniously drawn to meet the letter, porhaps, of the evidence, but not the substance of the testimony. It is true that Penelope S. Epps is the only witness who, in the language of the request, swears to the "immediate fact of killing." But read the statement of Sandford Roberts, and what a perversion of the evidence to assume that the widow of the deceased was the only witness of the homicide. Erase her testimony, entirely, from the record, and the Jury would have been more than justified in finding the prisoner guilty upon the evidence of Roberts. Indeed, if they believed him, they could not have done otherwise. The naked facts not only corroborate the testimony of both these witnesses, but, unexplained, point to John Epps as the murderer of his father.

Again: While it is shown that the defendant was a quiet

and peaceable man, it also appears that he had, for some time previously, cherished a spirit of bitter resentment toward his father for the wrongs which he accused him of inflicting upon his mother and sisters. In the presence of Joshua Stevens, he declared that if the old man brought the relations of his present wife to his house, that one or both of them would die. Similar expressions, indicating the feelings and purposes of the defendant, were proven by other witnesses. The general placability of the defendant, therefore, weighs not a feather under these circumstances.

The conclusion, then, is clear, that the legal proposition embodied in the request to charge, does not arise upon the facts of this case. Is the principle itself tenable? We think Suppose there be but a single witness to the homicide, and yet, his character is such as to place his veracity beyond question, and he testifies under such circumstances as to preclude the possibility of mistake as to the identity of the slayer and all the accompanying circumstances, would the bare fact that the defendant was a mild and inoffensive man, be, of itself, sufficient to create a reasonable doubt as to his guilt? We should be slow to enforce such a doctrine. cases of doubt, character is essential; and in all such cases, should preponderate in favor of innocence, especially where life is involved; but where the charge is positively proved, it cannot avail. Such is our understanding of the law.

[7.] If there be error in the seventh ground, it was committed against the State, and not against the prisoner. The proof was, that the killing was wilful—not accidental. And, Counsel for the accused had no right to ask a charge upon any other hypothesis. We concur, however, with the Court, in holding that had it been accidental under the circumstances supposed, it would still have been murder. If one goes to the house of another to take his life, and a death-struggle ensues on the one part to execute the felonious purpose, and on the other, to escape, and death ensues from the fortuitous firing of the gun, what is there, in such a case, to mitigate the offence? A man points his rifle at me with intent to

shoot, and by some means, the ball is prematurely discharged and I am killed. Can this be manslaughter?

[8.] Was James Dee a competent Juror? And if not, was the exception taken in time?

Decisions might be cited from the Courts of our sister States, directly sustaining the ruling of Judge Jackson. But we prefer to affirm it upon indisputable ground. By the 38th section of the Judiciary Act of 1799, (Cobb's Digest, 545-6,) no person is capable to be of a Jury for the trial of felony, who shall not be qualified to vote at elections for members of the Legislature; and if any person, not qualified as aforesaid, shall be returned on any Jury, he shall be discharged on the challenge and proof thereof, of either of the parties, or on his own oath, of the truth thereof: Provided that no exception against any Juror, on account of his qualification, shall be allowed after he is sworn.

Now it is admitted, that to qualify one to vote for the Legislature, he must usually have resided in the county for six months, and considered it his home or place of residence during that period. (Cobb's Digest, 239.) And consequently, Mr. Dee, the Juror, having lived in Clarke County for four months only last preceding the trial, he was incompetent to serve as a Juror. But it is equally clear, that under the proviso of the Act, the objection comes too late, not having been taken before the Juror was sworn. And it is no excuse that the disqualification was not known to the party or his Counsel. The Statute makes no such exception. It was their duty to have made inquiry, either of the Juror himself or of others.

An extreme case has been put to test the validity of this construction. Suppose, say Counsel, one or more of the Jury had been slaves or free persons of color, or females, and the disqualification had not come to the knowledge of the prisoner, as in this case, until after verdict? Our answer is, that if the disqualification was such, whatever it might be, as not to impinge the constitutional provision, that trial by

Jury, as heretofore practised, should remain inviolate, the verdict would stand. It might or might not, according to the nature of the disqualification, constitute a good ground for the interposition of the Executive. But a want of residence is no such ground; it is rather a recommendation, when the public mind becomes excited by the perpetration of a great crime, as in the present case.

- [9.] It is next assigned as error, that Joseph M. Williams conversed with William Wood and another Juror, after they This transpired in open Court. were sworn to try the case. and in the presence of the Judge. With a crowded courtroom, it is impossible to prevent some casual remark of this A Juror is, unexpectedly to himself, sworn and put upon the panel; he whispers to a friend some message to his family, or gives some directions concerning his horse. While we condemn the practice, as no one should speak to the Juror, nor he to them, without leave of the Court; still, no case has been found which decides that this is such an irregularity as will entitle the prisoner to a new trial; such misconduct as will require the verdict to be set aside. Solicitor General offered to show that no such conversation took place. But the Court dispensed with the proof, the defendant's Counsel not pretending that his client was prejudiced.
- [10.] The last error assigned is, that John C. Benedict, one of the Jurors who tried the case, having denied, under oath, that he had ever formed or expressed any opinion as to the guilt or innocence of the accused, when it appears from the affidavit of one Biggs, that he had previously formed and expressed a decided opinion, unfavorable to the prisoner, which fact was unknown to the prisoner or his Counsel until after the verdict was rendered.

When the motion for a new trial was made, this ground was supported alone by the eath of Biggs. And the Court refused to sustain it, because as the presiding Judge certifies, "it was affidavit against affidavit." Time was given until the next morning to offer additional proof, as to the incompetency

of Benedict, which not being produced, the motion was overruled—the Court being compelled to adjourn to reach Walton Court, which had been already postponed a day on account of No application was made for further time to file additional evidence. Two other depositions were subsequently obtained, after the case was finally disposed of and transmitted to this Court, with the remark by his Honor, Judge JACKSON, that the Solicitor General, residing in Lawrence. ville, had had no opportunity of procuring counter proof; nor had Benedict, the Juror, the opportunity of being heard in The Circuit Court has passed upon the case as his defence. it was originally presented, and we can only review his decis-Whether the statements of Winfrey and Booth would have influenced him to award a different judgment, we have no means of determining. Of one thing we are fully convinced, namely: that there is no reason for attributing this verdict to passion or prejudice. For we very much doubt whether twelve men in the county could have been found, who would have rendered any other. This unfortunate man, not. very bright at best, addicted to liquor and solitary in his habits, had suffered his spirit of resentment to engross his mind, until it had become almost a monomania with him; and thus possessed, he imbrues his hands, not in the blood of his brother, but of his father. Would that he were not only almost, but altogether, what his Counsel claim him to be, doli incamax!

Sims vs. Smith.

No. 25.—CLAIBORN SIMS, plaintiff in error, vs. WILLIAM SMITH, defendant in error.

[1.] An action had been brought for the trial of title to land under the form prescribed by the Act of 1847. Two verdicts were rendered thereon for the defendant. Subsequently, the same plaintiff brought his action against same defendant for the same premises, according to the Common Law forms prescribed for actions of ejectment: *Held*, that the Common Law rule which held the action of ejectment to be a trial of the right of possession of the fictitious plaintiff, is applicable only where the Common Law forms have been adopted and followed; that the Act of 1847 repeals the Common Law fiction as to all cases where it is followed; and when a verdict is rendered under it, the Common Law fiction must give way, and can no-longer apply, if another case be brought by the plaintiff against the defendant in the Common Law form of ejectment, if it can be shown that the latter case is, in truth and in fact, an action for the trial of the same title.

Ejectment, in Walton Superior Court. Tried before Judge JACKSON, August Term, 1855.

The questions in this case came up upon an agreed case The following were the facts: An action had been. brought under the form prescribed by the Act of 1847, in the name of the same plaintiff and against the same defendants as. in the case now pending. On that case two verdicts were rendered for the defendants. The land was the same, and no new title or right of possession was shown since the verdict in the former action. The present case was brought under the old fictitious form in ejectment. The former reco-The Court below held this to be very was pleaded in bar. no bar, and to this decision defendant below excepted.

T. R. R. COBB, for plaintiff in error.

COBB & HULL, for defendant in error.

By the Court.—STARNES, J. delivering the opinion.

[1.] The rule of practice, as derived from the English

Sims vs. Smith.

Courts was, that a recovery in ejectment did not bar a subsequent action. This rule was founded, I suppose, upon the nature and character of the action; which was a fictitious process brought to recover the possession of John Doe, a fictitious person.

By that fiction, if a verdict was rendered for the defendant, nothing more was decided than that John Doe was not entitled to the possession of the premises in question; perhaps the true effect of the verdict was only that he was not then entitled to possession. And when the action was again instituted, it could be brought in the name of John Dew or of any other fictitious person, upon the same demise or demises, and another person was supposed to try his action for possession of the premises. Or if the second action was in the name of John Doe, it was assumed to be another John Doe who sued; and thus, by virtue of the fiction, another trial was allowed, which would, in truth, perhaps, be an issue formed upon the same subject matter.

All this ingenuity and contrivance had their origin, no doubt, in the high estimate which was placed upon real estate in England, and its immense importance as an element in the feudal policy.

But whatever may have been the reason for the rule, such it was—such we received it; and we have made it a part of our law.

We are all ready to admit, however, I suppose, that there is no necessity for the rule with us, that there is no reason in our State why a suitor, claiming real estate in a Court of Justice, should have this advantage over one who was suing for personal property; that substantial and practical reasons cannot now be assigned for it. Still, if called upon to enforce it in such a case, and under such circumstances as would demand its enforcement at the Common Law, we should feel constrained to adopt it. But when a different case is presented, arising, in part, out of our own legislation, we are at liberty to adopt a more reasonable and practical rule.

That case is presented here. The first action, brought ac-

Sims vs. Smith.

cording to the provisions of our Statute of 1847, was a real and substantial claim of title, and it was determined against the plaintiff.

Now we regard the Act of 1847 as intended to try title, not possession. The plaintiff, confessedly, cannot directly bring another action against the defendant, under and by virtue of the provisions of that Statute, for the purpose of trying title to the same premises. Shall he he allewed to do so circuitously, by adopting the Common Law fiction?

This unreasonable result is avoided, by holding that the Common Law rule, which we have been considering, can properly be held applicable to the case of ejectment, only where the Common Law forms have been adopted and followed by the plaintiff—that the Act of 1847 repeals the Common Law fiction, as to all cases where it is followed; and when a verdict is rendered under it, the Common Law fiction must give way, and can no longer apply, if another case be brought by the plaintiff against the defendant, in the form of the Common Law ejectment, if it can be shown that the latter case is, in truth and in fact, an action for the trial of the same title.

Our brother Benning expresses himself not entirely satisfied with this conclusion, but adopts it in deference to the judgment of the other two members of the Court.

Let the judgment be reversed.

- No. 26.—ROBERT C. PARK and another, ex'rs, &c. vs. JOSEPH HARDY and another, guardians, and others.
- [1.] A testator's will contained this bequest: "I bequeath and set apart my rail road stock, being eighty shares in the Ga. R. R. & Bk'g Co. for the purpose of educating my children, now under age, and direct that they be boarded and educated out of the same until they receive a thorough classical education, if they have sufficient capacity for the same; and should my present wife have a child, it is to be boarded and educated in the same manner and share in all respects with my children now under age": Held, that this was not a bequest of the dividends on the stock to the children; and therefore, that their guardians were not entitled to call upon the executors for the dividends, or for a power to receive the dividends.
- [2.] The will also contained this: "I give and bequeath to my beloved wife,
 'Nancy Park, her choice of my negro women, to have and to keep the same
 during her life," &c. The wife, by the conduct of the executors, was prevented from making choice of a woman: Held, that she may still make
 choice of a woman, and that she will be entitled to receive, in addition to
 the woman, the woman's hire and issue of a date subsequent to the time
 when she demanded her property.

In Equity, in Jackson Superior Court. Decision by Judge Jackson, at Chambers, 19th June, 1855.

The following items appeared in the last will of William Parks:

"Item 4. I bequeath and set apart my rail road stock, being eighty shares, in the Ga. R. & Bk'g Co. for the purpose of educating my children, now under age, and direct that they be boarded and educated out of the same, until they receive a thorough classical education, if they have sufficient capacity for the same; and should my present wife have a child, it to be boarded and educated in the same manner, and share in all other respects, with my children now under age.

"Item 11. I give and bequeath to my beloved wife, Nancy Park, her choice of my negro women, to have and to keep the same during her life; then the said negro and her increase, if any, to belong to my estate."

Park, &c. vs. Hardy, &c.

Guardians were appointed by the Ordinary for the minor children of testator.

Upon a bill filed by the executors, for instruction upon various items in the will, the Court below, among other things, decided that a Court of Equity would not order the executors to authorize the guardians to receive the dividends on the rail road stock, directly, and without passing through their hands. To this decision, Hardy and Thempson, the guardians, excepted.

The Court also decided that the widow, Nancy Park, was entitled to recover hire for the negro she may select, and also her increase, from the time she demanded the same of executors. The facts, as to the demand, were, that the widow went to the executors and said, "I demand my property," meaning her property under the will. The executors refused to let her have any of it. To this decision of the Court, the executors excepted.

Each party assigned error in this Court.

COBB & HULL, for Park.

T. R. R. Cobb, for Hardy.

By the Court.—Benning, J. delivering the opinion.

What did the testator, by the fourth item of his will, give to his children?

He gave them so much of the "rail road stock" as would be sufficient to defray the expenses of their "thorough classical education," and the expenses of their board during the time of the education, on condition that they had "sufficient capacity" to receive such an education. He gave them no more than this.

This was such a proportion of the stock as might be equal to the dividends on the stock, or as might be greater than the dividends, or as might be less. It was a quantity, too, which would almost, of necessity, vary with itself, from year to year,

if not from month to month. It could not be the dividends.

[1.] It follows, that the children were not entitled to the dividends. And if the children were not entitled to the dividends, the guardians of the children were not entitled to call for the dividends, or for a power to receive the dividends.

It may not be amiss to add, that we think that the proportion of the stock, whatever it was, to which the children were entitled, was to be administered by the executors. That proportion we think, was to be applied, by them, to the payment of the expenses of the board and education of the children, from time to time, as those expenses fell due. We can see no other course that would be safe to the executors—especially as the bequest was a conditional one—was a bequest only on condition that the children should be found to have a certain degree of mental capacity.

In making the eleventh item of his will, it was probably the intention of the testator that his wife should be entitled to receive the negro woman she was, by that item, allowed to select, as soon as she should make the selection; and therefore, that she should be entitled to the hire and issue of the woman that might, after such selection, accrue and be born.

But the wife was, as we think, prevented from making a selection of a woman by the conduct of the executors towards her, when she demanded of them her property.

The question, then, becomes this: Is the wife to be deprived of a benefit which the testator intended for her, by not any fault on her part, but by the unauthorized conduct of the executors? And we say, certainly not, if there is any way of preventing the thing.

[2.] And there seems to be not much difficulty in finding a way to do that. Let the wife still select a woman, and let the selection be considered as relating back to the time when she was prevented, by the executors, from making the selection. In this way, she will get the woman and the woman's

Hargroves et al. vs. Batty, adm'r, &c.

hire and issue (if any) of a date subsequent to the time when her right accrued.

This, it seems, was the idea of the Court below.

We affirm both of its decisions.

- No. 27.—Malinda Hargroves and others, plaintiffs in error, vs. Robert Batty, administrator, and others, defendants in error.
- [1.] Every one who acquires assets by a breach of trust in the executor, is responsible to those who are entitled to the assets, if he is a party to the breach of trust.

In Equity, in Floyd Superior Court. Decision on demurby Judge TRIPPE, June Term, 1855.

This bill was filed by Malinda Hargroves, the widow and others, the children of Zachariah B. Hargroves, dec'd, (who were also the devisees under his will,) charging that said Zach. B. died possessed of sundry lots of land in and about the town of Rome, of great value, and specifically set out in the bill; that said Hargroves was, at the time of his death, Cashier of the Western Bank of Rome; that as such cashier, he gave bond, with one Tomlinson Fort as his surety. Shortly after his death, one William Smith, claiming to be the President of the Western Bank of Rome, pretended to have discovered a great defalcation in the cash assets of said bank, and charged the same upon said Hargroves; that he demanded settlement of the same from James M. Spurlock and the said Malinda, who were the executor and executrix of the last will of said They refused so to do, and suit was commenced against them as executors, in the name of the West. Bank of

Hargroves et al. vs. Batty, adm'r, &c.

Rome. In the meantime, Smith managed to have Tomlinson Fort informed of the alleged defalcation and suit, and his probable liability as surety, and thus alarmed him very much. Fort immediately repaired to Cass County, and urged the executor and executrix to settle the claim, and finally overpersuaded them and induced them to recognize the claim; and in settlement thereof, (in August, 1840,) the said executor and executrix conveyed, by deed, to said William Smith, the valuable real estate before mentioned, for the sum of The deed was made to Smith, because the charter **\$**10.000. of the bank forbade the corporation to purchase and hold real estate, and was done in fraud of the charter. The bill alleged that there was no such defalcation in fact, and the book of accounts of the bank showed that there was no such defalcation, which book of accounts it alleged Smith subsequently burned or otherwise destroyed, for the express purpose of depriving complainants of this evidence; that Fort was a relative of complainants, and had great influence over *the executor and executrix, holding out to the said Malinda the exposure of her husband's defalcation and the ruin of his character, as inducements to procure her signature to this The deed was not delivered to Smith, but was delivered to Fort, to be held until there was a farther reduction of \$4.000 upon the claim of the bank, but Fort confederating with Smith, paid no regard to this condition, but delivered up the same immediately to Smith; that Smith has since conveyed different portions of this real estate to Alfred Shorter, C. M. Pennington and John H. Lumpkin, each and all of whom purchased with full notice and knowledge of the fraudulent manner in which Smith obtained this deed. The bill made these purchasers co-defendants with Smith. prayer was, that the deed to Smith be annulled and set aside, and all the subsequent conveyances from Smith; that the property be placed in the hands of a receiver, to pay off the creditors of Hargroves, and pay the balance to complainants; and that the defendants account for the rents, issues and profits of the said property.

Hargroves et at. vs. Batty, adm'r, &c.

To this bill a demurrer was filed-

1st. For want of parties, viz: James M. Spurlock and Malinda Hargroves, the executor and executrix of Hargroves, and testamentary guardians of the minor children; also, the creditors of Hargroves; also, Tomlinson Fort and the Western Bank of Georgia.

2d. For want of Equity.

The demurrer was sustained and the bill dismissed; and this decision is assigned as error.

PRINTUP; WRIGHT; COBB, for plaintiffs.

UNDERWOOD; HULL, for defendants.

By the Court.—Benning, J. delivering the opinion.

In the language of Sir John Leach, "Every one who sequires personal assets by a breach of trust or devastavit in the executor, is responsible to those who are entitled, under the will, if he is a party to the breach of trust." (Ram on Assets, 490; and see Williams on Ex'rs, 609. Story's Eq. §§422, '3, '4, 579, 580, '1. Gilbert vs. Thomas et al. 3 Ga. R. 581.)

Much more is this true if the executor be insolvent. And in this case, the executor is said, by the Counsel for the plaintiff, to be insolvent. And this Court ordered that the bill should be amended, by the addition of an allegation to that effect.

In this State, the proposition is not to be confined to personal assets, for in this State real property and personal property are "considered as altogether of the same nature and upon the same footing" as to distribution. (Pr. Dig. 233.)

If the bill be true, and the demurrer admits it to be true, there was no foundation, whatever, for one of the claims which Smith, the president of the bank, presented to the executors for payment; and this was known both to Smith.

Hargroves et al. vs. Batty, adm'r, &c.

and to Spurlock, one of the executors—the one who controlled the assets.

The application of assets by Spurlock, to the payment of such a claim, was clearly a breach of trust—a devastavit; and Smith, knowing the nature of the claim—knowing its falseness, by receiving such assets in payment of it, became a party to the breach of trust.

Consequently, Smith became responsible for those assets, to the person entitled to the assets; and they, it seems, were the plaintiffs as legatees; that is to say, the plaintiffs consequently became entitled to follow the assets into the hands of Smith.

And if the bill be true, Shorter, Pennington and Lumpkin took the part of the assets which they respectively got, either mediately or immediately from Smith, with the same knowledge which Smith had of the facts which constituted the devastavit. Neither of them, therefore, can be in any better condition than Smith would have been in, had he not parted with the assets.

The result is, that the complainants have the right to follow the assets which were applied to the payment of the false demand, into the hands of the defendants.

It seems that the assets turned over to Smith, were turned over to him on the making of a settlement—a settlement not only of the false demand aforesaid, but also of several other demands, which were not false—these amounting, in the aggregate, to say \$1.517 93—that to \$12.850.

This being so, if it cannot be ascertained which of the assets turned over were those which were applied to the payment of the false demand if any in particular were so applied, then, of necessity, the settlement will have to be set aside, and all the assets used in it considered as assets still belonging to the estate; and therefore, as assets subject to be applied in a due course of administration.

Perhaps even if that could be ascertained, yet, the settlement would nevertheless have to be aside: for when a part of the consideration of a contract is void, the whole contract The Trustees, &c. vs. Robbins.

is said to be void, although the other part of the consideration may be good. (1 Smith's Lead. Cases, 169.) And the greater part, by far, of the consideration moving to the executor for the making of this settlement, was void.

For these reasons, we think that there was equity in the bill.

The questions, whether the Western Bank of Rome is not, by its charter, forbidden to buy, as well as to buy and hold real property? Whether it is not forbidden to do this by the Statutes of Mortmain 2 Whether the deed was ever delivered, except as an escrow? are each important questions; but as they were not much argued, and as it is not essential that they should be decided, they are not decided.

No. 28.—The Trustees of Hearne Manual Labor School, plaintiffs in error, vs. Sam'l W. Robbins, defendant in error.

A Court of Equity will not arrogate to itself jurisdiction, where the remedy at Law is complete.

In Equity, in Floyd Superior Court. Decision on demurrer, by Judge TRIPPE, June Term, 1855.

The Act incorporating the "trustees of the Hearne Manual Labor School," provided that "no person shall, by himself, servant or agent, keep, have, use or maintain a gaming house or room of any description, or permit, with their knowledge, any house or room occupied or owned by him, to be used by any person whatsoever, as a gaming place; nor shall any person, by himself, agent or servant, keep or allow, with his knowledge, others to keep or sell ardent spirits, wine, cordials, porter or any other intoxicating drinks whatever; nor permit the

The Trustees, &c. vs. Robbins.

same to be done with his or her knowledge or approbation, on the premises which he or she might occupy." A proviso excepted the sale of spirits for medical and sacramental purposes. Another section authorized the trustees to insert conditions to the effect above stated in their conveyances.

The trustees filed this bill against Samuel W. Robbins, alleging that they conveyed to him a lot of land belonging to said school, inserting a condition therein, that upon his doing or allowing others to do any of the above prohibited acts on the premises conveyed, he should suffer a forfeiture of said lot, and a penalty of \$1000 for each offence. The bill alleged that he had violated every provision, both as to gaming and the sale of liquors. The prayer was for a decree that the deed might be declared forfeited and given up to be cancelled, and possession of the premises given to the complainants.

The Court sustained a general demurrer to this bill for want of equity; and this decision is assigned as error.

WRIGHT, for plaintiffs in error.

ALEXANDER, for defendant in error.

By the Court.—LUMPKIN, J. delivering the opinion.

[1.] Holding, as we do, that the Common Law remedy in this case is complete, and that the right of re-entry accrued to the grantor so soon as the condition of the deed was broken, we see no sufficient ground for the jurisdiction of Equity. It will be time enough when the plaintiffs get into possession, and are sued by some one claiming under Robbins, to resort to Equity for a cancellation of the deed. Upon the broad principle upon which the interposition of a Court of Equity is invoked in this case, every suitor in ejectment might call upon Chancery to have his adversary's title delivered up to be annulled, before its validity had been passed upon at Law; and thus, overturn the well established practice in such cases.

Kerr, adm'r, &c. vs. Waters et al. ex'rs.

No. 29.—John Kerr, administrator, &c. plaintiff in error, vs. Thomas J. Waters and others, executors, defendants in error.

[1.] One executor is not Hable for assets which come to the hands of his co-executor; nor ordinarily responsible for his lackes.

In Equity, in Gwinnett Superior Court. Tried before Judge Jackson, March Term, 1855.

This bill was filed in 1850, by Sarah Elbert, against George M. Waters, as one of the executors of John Pray, deceased, to recover a legacy bequeathed her, of \$500, to be paid from a bond held by testator on John J. Maxwell, a co-executor with Waters, and due in 1827. Pray died in 1819. Pending the suit, both complainant and defendant died, and their representatives were made parties. The defendant's answer showed that the bond of Maxwell had never been in the custody of Waters; that in 1826, Waters ceased to take any active part in the management of the estate; and relied also upon the lapse of time as a bar. A joint inventory, made by the executors, included this bond.

Complainant's Counsel requested the Court to charge the Jury—1st. That an executor is liable for the default of his co-executor.

2d. That when one of two executors is a debtor to the estate, and is solvent at the time of taking execution of the will, it is the duty of the co-executor of such debtor, to see that the debt is paid into the funds of the estate; and that if it is lost, he neglecting to look after it, he is liable.

3d. That when two co-executors execute a joint inventory of the estate, and return the same to the Court of Ordinary as their joint act, that each is liable for the whole estate so inventoried, and responsible for each other's safe-keeping and management thereof, without reference to a subsequent division of the assets between themselves.

Kerr, adm'r, &c. vs. Waters et al. ex'rs.

4th. That the plaintiff is not barred, in this case, by the lapse of time.

The Court declined so to charge, but charged the Jury, that one executor was not bound for the default of his co-executor, unless he came into possession of the estate squandered, or participated actively in the management of the particular estate squandered; that the fact of a joint inventory and appraisement, was not, "in the teeth of the defendant's answer," sufficient evidence to bind Waters for this bond

This charge and refusal to charge are assigned as error.

HUTCHINS; COBB & HULL, for plaintiff in error.

PREPLES; T. R. R. COBB, for defendants.

By the Court.—LUMPKIN, J. delivering the opinion.

In Hall and others, plaintiffs in error, against Carter & Kenan, executors, &c. (8 Ga. R. 388,) this Court held, that one executor is not liable for assets which come to the hands of his co-executor, nor was he ordinarily responsible for his devastavit.

We consider this case as fully embraced in that decision. Indeed, without stopping to institute a comparison between the two, we have no hesitation in saying, that this is a much weaker case than the other, on many accounts. Not only was the bond of John J. Maxwell, the co-executor, out of which the legacy bequeathed to Sarah Elbert was to be paid, never in the possession, custody or control of George M. Waters, but the latter had ceased, for a quarter of a century, to take any active part in the management of the estate of Pray, the testator—John Pray. And that is not all. Maxwell, the co-executor and real debtor, resides in the neighboring State of Florida, and is entirely responsible. If he is in default, follow him and let not the collection of this claim be forced out of an innocent party, on account of the laches of Maxwell.

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CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF THE STATE OF GEORGIA,

AT MILLEDGEVILLE,

NOVEMBER TERM, 1855.

Present—JOSEPH H. LUMPKIN, EBENEZER STARNES, HENRY L. BENNING.

- No. 30.—Reuben and Charles Jordan, plaintiffs in error, vs. John W. Porterfield, defendant in error.
- [1.] A ca. sa. which was erroneously dated, so that at the time it was dated, the person in whose name it bore teste was not a Judge of the Court from which it issued, is not void, but only irregular; and a Sheriff will not be protected who refuses, on this ground, to execute it.

Rule vs. Sheriff, in Madison Superior Court. Decision by Judge Andrews, at March Term, 1855.

A ca. sa. in favor of Reuben and Charles Jordan vs. Jefferson Culbertson, was placed in the hands of the Sheriff of Madison County. The Sheriff arrested Culbertson and discharged him, on his giving bond, conditioned "that in the event

Jordan vs. Porterfield.

Culbertson should be cast in said suit, they should well and truly pay the condemnation money," &c. At March Term, 1855, a rule nisi was granted against the Sheriff, to show cause why he should not pay over the amount due on said ca. sa. The Sheriff made return, showing various grounds, all of which were over-ruled by the Court, except the following: "Because the ca. sa. bears test in the name of Garnett Andrews, who, at the date of its issue, was not one of the Judges of the Superior Courts of said State;" which ground was sustained, and the rule refused. To this decision plaintiffs' Counsel excepted.

Plaintiffs' Counsel proposed to prove that the ca. sa. bore a wrong date, by a clerical mistake, and that it was actually issued in December, 1854; and also moved to amend the ca. sa. as to this clerical mistake. All of which was refused by the Court, and plaintiffs excepted.

Upon these exceptions, error is assigned.

T. W. THOMAS; T. R. R. COBB, for plaintiffs in error.

PEEPLES; COBB & HULL, for defendant in error.

By the Court.—STARNES, J. delivering the opinion.

Requiring this record to speak strictly for itself, it shows nothing more than a defect in the teste of this ca. sa. If the Sheriff was to know that Garnett Andrews was not Judge of the Superior Court in December, 1852, (the date of the process,) he should be required also to have known that this was a mere defect in the teste of the ca. sa.; that this teste was mere matter of form—not a substantial portion of the execution, and that the defect was therefore merely an irregularity, and did not vitiate that process.

In such cases of mere irregularity of process, an officer refuses to act, upon his peril.

We think the natural presumption in this case was, that there was a clerical mistake as to the date, and if the Sheriff

Matthews vs. Pass.

found that this defect was an obstacle in the way of executing the process, it was his duty to have brought it to the attention of the Clerk, in which event, the mistake might have been remedied. The idea of permitting him to shelter himself under such a plea, on account of failure to take a proper bond, cannot be tolerated for a moment.

Judgment reversed.

No. 31.—Albert C. Matthews, plaintiff in error, vs. Wil-LIAM Pass, defendant in error.

[1.] A person aids a debtor to remove himself and his property out of the State: *Held*, that an action on the case does not lie against that person, at the suit of the creditor.

Case. Decision by Judge Andrews, March Term, 1855.

Albert C. Matthews brought an action against William Pass, alleging that one James Bridges was indebted to him in the sum of five hundred dollars, on promissory notes and accounts; and that William Pass, well knowing the same, and intending to injure and defraud said Matthews, by causing him to suffer the loss of said sums of money, did then and there conspire, and fraudulently and feloniously agree with the said Bridges, to aid him in running away from the County and State and carrying off his property, viz: 4 slaves, worth \$2500, and other property worth \$500; and did actually aid said Bridges in running away from said County and State and carrying off his property: whereby, the said debt due by Bridges to Matthews, became totally lost, to the damage, &c.

Defendant's Counsel demurred to this declaration, on the ground that no cause of action was set forth therein.

Matthews &. Pass.

The Court sustained the demurrer, and this decision is assigned as error.

THOS. W. THOMAS, for plaintiff in error.

T. R. R. COBB, for defendant in error.

By the Court.—Benning, J. delivering the opinion.

[1.] Is there any cause of action set forth in the declaration?

The plaintiff's argument that there is, if I understand it aright, may be stated as follows:

- 1. You may have an action in some form, against another, for every act of his which is unlawful and which injures you.
- 2. When no form of action is specially given, you may have an action on the case.
- 3. Any act which a law impliedly forbids, is unlawful; as much so as is any act which a law expressly forbids.
- 4. The Attachment Law impliedly forbids a debtor to remove out of the State; and thus, to place himself beyond the reach of ordinary legal process.
- 5. It is therefore unlawful in a debtor to remove out of the State.
- 6. If it is unlawful in a debtor to remove out of the State, it must be unlawful in another person to aid him so to remove.
- 7. No form of action is specially given against such other person; therefore, he may be sued in case.

The fourth of these propositions, to say nothing about the others, cannot be admitted.

A man, even if he is a debtor, is a freeman until he has been arrested by some legal process, at the suit of his creditor. Until that has been done, he has the right to take his person whithersoever he will.

Equally has he the right to remove his property. As to his property, there certainly is no law which makes it unlawful for him to send or remove that out of the State. Until

Matthews vs. Pass.

his creditor has obtained a lien on his property, he has full control over it.

There is nothing in the Attachment Law inconsistent with this doctrine. Indeed, the object of the Attachment Law seems to have been to obviate the consequences of the truth of this very doctrine. It says to a creditor, this, your debtor, has the right to take himself and his property out of the State; but while he is going, you may attach his property if you can; if you cannot, you will get no lien on it; the property will be his to sell, or to keep, or to remove.

But if it is not an unlawful act in a debtor to remove from the State, and to carry with him his property, it is not an unlawful act in another to assist him to remove, and to assist him to carry with him his property.

Again: Will the law ever hear a plaintiff unless he can state two things: first, that he has been damaged; secondly, that the damage was, to a certainty, the effect of the act of the defendant. If the plaintiff says I have been damaged, but it is not certain whether I should not have been equally damaged if the defendant had not done what I charge him with having done, can he be heard? Does he state a cause of action?

What more than this does the plaintiff in this case say? He would have it understood that it would have been his intention to sue his debtor, Bridges, and that he was prevented. from executing this intention which he would have had, by the removal of Bridges, with his property, from the State. Admit that what would have been his intention, is a provable thing; yet, how can it ever be made appear that the removal of Bridges and his property would not have happened, even if the defendant, Pass, had taken no part in such removal? How can it ever be made appear that Bridges would not have been able to effect his removal without the aid of any one, or would not have been able to get the aid of some person other than Pass?

There is no precedent for this case; and the case is such, that if there had been law for it, there would have been a pre-

Matthews vs. Pass.

cedent for it. It is hardly possible that there would not have been. Cases like this have been continually occurring ever since the birth of credit. Has there ever been a time when men were not aiding debtors to evade the payment of their debts? Yet, there is not to be found an instance of an action on the case against such men, by the creditor. If the law had been such as to give the creditor that action, should we not, at some time, have seen the creditor resorting to the action? Cases may be of such a character, that if they are without the support of a precedent, it may be almost certainly said, that it is because they are without the support of law. And this is one of them.

If we were at liberty to take the decisions of other States as precedents for the decisions of this, we might, with ease, find them against this case. Lamb vs. Stone, (11 Pick. 527,) is a strong one against it. In that case, the many and grave-practical difficulties with which a case of this kind has to contend, are well stated.

This plaintiff claims from the defendant damages to an amount equal to the amount of his debts. Suppose he should recover damages to that amount, what would become of those debts-would he be entitled to recover them, too, out of the debtor, if he could find him in another State? Would they be extinguished? The recovery against Pass being in tort. he could set up no title to them by subrogation or otherwise. Indeed, Pass would not be entitled to an action over against . Bridges, for his re-imbursement. But I suppose the plaintiff : would be entitled to go on against his debtor, Bridges, if he could find him and collect the debts out of him. It is to be remembered that Bridges is to be considered amply able topay the debts, wherever he is, for he carried away with him. property worth much more than they amount to. Nor is itto be assumed, that because Bridges is outside of this State, he is outside the pale of law. It is not to be assumed, that merely because the creditor lives in one State and the debtor in another, the debt is worthless. And doubtless little pains on the part of this plaintiff, would enable him to

Fleming vs. Hammond.

find out where Bridges is, if, indeed, he does not already know. The strong probability therefore is, that if the plaintiff should be allowed to recover the amount of his debts in an action on the caseout of Pass, he would then follow up Bridges and recover out of him the same amount in an action of assumpsit. Now ought a suit that could possibly work out such a result, to be entertained, unless it was well supported by precedents or by positive law? Ought not the plaintiff to be, at least, required to state, as a part of his case, that he had offered Pass to give him up the debts on Bridges, if he, Pass, would pay him the damages which he claimed of him?

We think the judgment of the Court below ought to be affirmed.

No. 32.—HENRY G. M. FLEMING, plaintiff in error, vs. ALFRED HAMMOND, defendant in error.

- [1.] Where a verdict is rendered upon vague and unsatisfactory testimony, when it is apparent that better proof can be procured, a new trial will be granted; especially if the finding be against the weight of evidence.
- [2.] If the owner of a boat directs cotton to be left at a particular landing on the river, agreeing to receive it there, a deposit of the cotton at that place constitutes a good delivery.

Case, &c. in Elbert Superior Court. Tried before Judge Andrews, March Term, 1855.

This was a suit by Alfred Hammond vs. Fleming, for the value of two bales of cotton, alleged to have been lost by Fleming, a boatman, to whom it was delivered, to be carried to Augusta.

VOL. XIX-19

Fleming vs. Hammond.

The plaintiff below relied on proof that he delivered twenty-two bales of cotton on the river bank at the boat landing of Fleming, by evidence that the overseer started that number of bales to the river; and that only twenty bales were delivered to his factor in Augusta. He also proved, that by contract, he was to get 10 cents per lb. for all his cotton crop of that year, delivered in Augusta, and that, at the time the twenty bales arrived, cotton was worth 9½ cents. There was conflicting evidence as to the number of bales delivered on the river bank.

In addressing the Jury, plaintiff's Counsel contended, that in law, a delivery of the cotton at the public landing, was a delivery to the defendant. Defendant's Counsel controverted this law, but neither party asked the Court to charge. The Court simply said to the Jury, "This is only a question of fact; retire and make up your verdict." The Jury found for plaintiff $\$79_{100}^{76}$, with interest from 11th November, 1852.

A new trial was moved, on the following grounds: 1st. There was no evidence of the quantity of cotton lost.

- 2d. There was no evidence of the value of the cotton.
- 3d. That the Jury allowed, in their verdict, the market price of cotton in Augusta, without deducting the expense of getting it there.

4th. There was no evidence of delivering.

5th. That the Court failed to charge the Jury on the law of the case, and especially on the question on which the Counsel were at issue.

6th. That the verdict was not supported by the evidence, and was illegal in allowing interest.

The Court refused the new trial, on the plaintiff's remitting, the interest given; and error is assigned on this refusal.

THOMAS, for plaintiff in error.

VANDUZER, for defendant in error.

By the Court.—LUMPKIN, J. delivering the opinion.

While we think that the weight of evidence was against the plaintiff, as to the quantity of cotton delivered, and on that account, should be inclined to order a new trial, we shall send this case back, because no verdict can ever be satisfactory, which is rendered upon proof so vague and uncertain.

[1.] This action is brought to recover the value of two bales of cotton, it being alleged and attempted to be proved, that 22 bags were delivered to the defendant, and 20 only received at that ware-house in Augusta, to which it was shipped. Now the testimony shows, that 20 bags reached Augusta the 9th of November, and one other bale the 4th of December, Was or was not this one of the two missing bags? Counsel for plaintiff, arguendo, says that it was not, but the last picking or refuse cotton, made on the plantation by Ma-This explanation might do very well but for jor Hammond. the evidence of Mr. Clark. He swears, that as the mutual friend of the parties, he divided the crop of 1852 between the plaintiff and Denard, his overseer, and that he weighed and marked 22 bales for the plaintiff, and two for Denard. It would seem, therefore, that 24 bales was the entire crop of that year. The question as to this odd bale, can be demonstrated and made clear; and it should be done, as it constitutes one half of the amount in controversy. to rest men's rights upon facts, than conjecture and ingenious argumentation.

One other point in this case is susceptible of more light than has been thrown upon it. Alfred Asbell testifies, that he was present when the cotton was taken on the boat, at Calhoun's landing, and that there was only 20 bales; that his attention being called to the matter, he took particular notice; that he went down as a passenger, and that the boat was not broke that trip, but that the cotton was carried safely and stored at Stovall's warehouse.

No witness swears that 22 bales were delivered at the river.

Fleming vs. Hammond.

James C. Nelms testifies, that Fleming, in a conversation which he had with him in February, 1853, admitted, that the plaintiff's cotton was on his boat when the disaster occurred, but that he secured all the cotton.

Was or was not the boat broken during this trip? Could not additional evidence be obtained upon this point? The probability as to the loss of a part of the freight, as well as the credibility of Asbell, will depend very much upon the ast certainment of this fact.

There is some doubt as to the measure of damages. The weight of the 20 bales of cotton which were received at the warehouse, was 7976 pounds, which were sold two days after their arrival, to wit: on the 11th of November, 1852, at 9½ cents per pound. But the plaintiff contends, upon the testimony of Mr. Hickman, that averaging the two bales lost, by the 20 received, he is entitled to estimate the cotton at 10 cents, as the witness states that he did agree to purchase the plaintiff's crop that year at that price.

While we see no objection to the mode of ascertaining the weight of the two missing bags, as being the best, if not the only means of arriving at a knowledge of that fact, we are not equally well satisfied as to the price. At whose instance and for whose benefit was the lot of cotton sold at 9\frac{1}{2}? It is replied, Cress and Hickman. This may be so, and probably is true. Still, the matter should be, because it can be, settled definitely, and not be left to surmise. Mr. Hickman did agree to give Major Hammond 10 cents for his crop of 1352, delivered in Augusta. But did he do it?

Counsel for the defendant insists that the verdict was erroneous, because the Jury failed to allow his client a deduction from the price of the two bags of cotton, for his freight on the whole load. Was there any proof what this was? And that it had not been paid, at least on the 20 bales, at the warehouse in Augusta?

[2.] Counsel differ in this Court, as they did in the Court below, as to what constitutes a good delivery. If the testimony of Denard be believed, we have no hesitation in septing.

that a sufficient delivery is proven, to charge the common carrier. Fleming was in the habit of receiving cotton at the different landings on the Savannah River. And this witness swears that the cotton was deposited on the bank of the river where the defendant told him to place it. If this be so, we repeat, it was true, as contended for by plaintiff's Counsel, that the delivery was as complete as if the produce had been placed under the defendant's lock and key.

It is complained, that the Court omitted to charge the Jury, notwithstanding the disagreement between Counsel, as to the law of the case; and that they were instructed, on the contrary, that it was only a question of fact submitted for their finding.

Perhaps this disposition of the case was a little hasty, not to say slovenly. We do not decide that it is the duty of the Court to instruct the Jury as to the law, in every case, even though Counsel differ as to what the law is, whether the Court is requested to do so or not. But it might have been as well to have told them what did or did not amount to a delivery.

Upon the whole, we think it best to remand this cause for a re-hearing.

No. 33.—EPPY W. ROEBUCK and another, ex'rs, &c. plaintiffs in error, vs. Dozier Thornton, Sheriff, &c. defendant in error.

^[1.] The Sheriff goes to levy a f. fu; the defendant tells him to enter a levy on a negro. The Sheriff does not see the negro, but enters the levy. The defendant gives a bond for the forthcoming of the negro. On the day of sale, the negro is forthcoming, and is sold by the Sheriff: Held, that the Sheriff was authorized to sell the negro.

Assumpsit, &c. in Elbert Superior Court. Tried before Judge Andrews, March Term, 1855.

This was an action, by the Sheriff, against a purchaser, at his sale, who refused to comply with his bid. On the trial, the Deputy Sheriff testified that he did not see the negro until the day of sale; that when he went to levy, the defendant in fi. fa. told him the negro was there, and to enter a levy on the fi. fa.; and defendant gave a bond for the forthcoming of the negro, and in compliance therewith, produced him at the day of sale.

The Court decided and charged the Jury, that these facts constituted a legal levy; and this is the only error assigned in this case.

T. R. B. COBB, for plaintiff in error.

T. W. THOMAS, for defendant in error.

By the Court.—Benning, J. delivering the opinion.

[1.] The negro was produced by the defendant in fi. fa. on the day of sale, and was, on that day, sold by the Sheriff.

The question is, did the Sheriff, under the circumstances of the case, have authority to sell the negro?

The Counsel for the plaintiff says no. His position is, that a Sheriff has no authority to sell property under a fi. fa. if he has not actually laid his hands, or at least his eyes, on the property. His idea is, that nothing short of this will amount to a levy.

But do the terms of the fi. fa. require as much as this! They are, that "you cause to be made of the goods and chattels, lands and tenements of the defendant, the sum" recovered. In these words, there is nothing about laying hands or eyes on the goods and chattels, lands and tenements.

In truth, these words command the Sheriff to make the

money of some things which cannot, from their nature, be actually seized or seen, as the *remainder* in lands, and indeed, in goods, annuities, stock in banks. (*Watson's Sheriff*, 178. **Pr.** Dig. 452.)

Again: A part of a parcel of goods may be seized in the name of the whole. In such case, a part of the goods is not actually seized, and may not be seen; yet, the whole is levied on. (Wat's. Sheff. 172.)

By a Statute of ours a Sheriff may leave the property in the possession of the defendant in fi. fa. if the defendant will agree to have it forthcoming at the time and place of sale and will give his bond to that effect. (Pr. Dig. 465.)

Under this Statute, therefore, the Sheriff may seize property one instant and the very next deliver it back in exchange for a bond. What need is there for this form of seizure, if the defendant will give the bond without it?

But, indeed, when the defendant gives bond under this Statute, he acknowledges that he, from thenceforth, holds the property, not for himself, but for the Sheriff—he acknowledges that his possession is the Sheriff's possession—he becomes the Sheriff's agent.

Now when the Sheriff, acting under the fi. fa. has managed to get the property of the defendant in fi. fa. into any body's hands, even the defendant's, as his agent, has he not levied the fi. fa.? Has he not seized the property? Is he not in possession of the property?

In practice, what more than this does the Sheriff do whenever he accepts a forthcoming bond? In such cases, it is not one time in ten that he, himself, takes actual manual possession of the property. He takes possession of it by the defendant's binding himself to hold it for him. His whole levy consists in that.

What, then, is the essence of a levy? It is the Sheriff's getting power over the property—such power as will enable him to sell it at the proper time and place. This he gets whenever he gets the property into his own hands, or into the

hands of another as his agent. There is no law saying that the defendant in f. fa. shall not be this agent.

That this is the essence of a levy, is, it seems to me, admitted, when it is admitted, as it is in many American cases, that a levy is good if the Sheriff sees the property, although he does not touch it. For it cannot be meant that the bare sight of the defendant's property will do—the sight of it, for example, when the defendant is making off with it and will soon have it beyond the Sheriff's reach. What is meant must be, that if the Sheriff gets to see the property; and, in addition, gets a promise expressed or understood from the person having it in possession, to hold it for him till he wants it, that will do. If this be what is meant, it is manifest that the virtue of the thing consists, not in the Sheriff's getting this sight of the property, but in his getting this promise. It is certain that seeing property is not seizing property.

Any act by which the Sheriff, acting under the fi. fa. gets the defendant's property into his own hands, or any act by which he gets the defendant's property into the hands of any other, not excepting the defendant himself, as his, the Sheriff's agent, amounts to a levy. This, I think, is the true idea of what is essential to a levy.

But be the true idea of what constitutes a levy what it may, the levy in this case must, we think, be held to have been good. The defendant gave a forthcoming bond. That bond, by its terms, estopped him from saying there had been no sufficient levy. But if it estopped him, the purchaser got a good title, for it does not appear that there was anybody else interested in the property. And if the purchaser got a good title, he ought to comply with the terms of the purchase; he ought to pay the purchase money.

This is the substance of what the Court below charged.

No. 34.—HENRY G. PETERMAN, plaintiff in error, vs. PHILIP WATKINS, defendant in error.

- [1.] Where a rule nisi was granted upon a petition to the Court of Ordinary, praying that an administrator might be directed to execute titles in pursuance of a bond given by his intestate, which rule required publication in a newspaper instead of "in the public places of the county," as the Statute prescribes, and the rule was published in the said paper only, and titles were afterwards directed to be made by the Court, were so executed, and there was an acquiescence in the proceeding for more than twenty-five years: Held, that under these circumstances, the rights acquired must be protected, notwithstanding the irregularity, at least until displaced by some direct proceeding in the Court where the judgment was rendered. Held, also, that the Statute was not void because of the indefiniteness of the term "public places of the county;" that the term was intended to designate such places as the court-house, muster grounds, places of holding Justice's Courts, &c. and that the Act referred to publication at the most prominent, and not to all the public places in the county.
- [2.] It was sufficient if the title was executed by the administrator de bonis non, under the order directed to the first administrator. A special order, directed to the administrator de bonis non, was not needed.

Ejectment, in Oglethorpe Superior Court. Tried before Judge Andrews, April Term, 1855.

The plaintiff below, and plaintiff in error, traced his title to James Jordan. He then offered a deed from Warren Jordan and Thomas G. Sanford, as administrators de bonis non of James Jordan; and as foundation thereto, offered a petition of Willis Jones to the Court of Ordinary of Oglethorpe County, setting forth a bond for titles from James Jordan, and praying an order directing Theophilus Hill, administrator, &c. to make titles; and also an order nisi and order absolute, requiring Hill to make the titles; also, the appointment of Jordan and Sanford, as administrators de bonis non. Defendant's Counsel objected to the sufficiency of this evidence—

1st. Because the rule nisi required its publication "once a

Peterman vs. Watkins.

month for three months, in the Georgia Journal" only, and not at "the public places of the county."

- 2d. Because the rule absolute shows that the rule nisi was not published at the "public places."
- 3d. Because the order to Hill to make titles, did not authorize the deed to be made by Jordan and Sanford.

The Court sustained these objections, and this decision is assigned as error.

T. W. THOMAS, for plaintiff in error.

T. R. R. Cobb, for defendant in error.

By the Court.—STARNES, J. delivering the opinion.

[1.] Let it be admitted that the rule nisi, which was entered upon the petition of Willis Jones to the Court of Ordinary, (praying an order that the administrator of James Jordan might be directed to make and execute to him titles to the land specified, in pursuance of the bond which had been executed,) required publication to be made in the Georgia Journal, and not in the public places of the county, as the Statute prescribes; and that the rule was published in this newspaper, and not in these public places. What then?

Why, in such case, it would seem that the Court of Ordinary irregularly proceeded to order the execution of titles.

But that Court undeniably had jurisdiction of the subject matter. Its proceedings were not void therefore, but simply irregular. The petitioner, relying upon such proceedings, received his title, and there was an acquiescence on the part of all concerned, from that period, viz: sometime in the year 1828, until the commencement of this case in the Court below, a term of more than a quarter of a century. It would be, indeed, a great outrage upon justice, if now the party claiming under this title should be deprived of the rights which it was intended to secure, in this collateral way, because of such a mistake or irregularity.

Peterman vs. Watkins.

In such a case, rights acquired must be protected until they are displaced by a direct proceeding in the Court where the order or judgment was rendered, correcting and setting aside such order or judgment. For a more elaborate consideration of this point, see the case of *Tucker vs. Harris*, (13 Ga. R. 1.)

It was argued that the law authorizing this proceeding, by which the execution of titles was directed and completed, is void, because prescribing terms of so vague and indefinite a character as to render compliance with them impossible.

The Act requires publication of the rule "at the public places of the county;" and it is urged, that the term "public places" is so loose and uncertain as not to admit of compliance with the requirement.

We do not feel the force of this observation, but think that by the term "public places," it was intended to designate such public places as the court-house, the places where the Courts of Justices of the Peace are held, the muster grounds, &c. and that the Act does not require the publication to be at all the public places, but at some of the most prominent of such places.

[2.] Another objection was sustained by the Court below, and is now urged before us, viz: that the order directing the administrator, Hill, to execute titles, did not authorize the administrators de bonis non to make such titles, but there should have been a separate order for their direction.

This is a mere technical exception, of no substance, and not affecting the merits of the case. If it were right and proper that the title should be executed, what did it matter whether the titles were made by the administrators de bonis non, in pursuance of the order directed to their predecessor, or whether by reason of a special order directed to them? And how exceedingly unjust to the party now relying upon the title it would be, if, after a lapse of twenty-seven years, and this long acquiescence in what was done, he should lose his rights because of this fact!

If we were prepared to say (which we by no means are)

Peterman vs. Watkins.

that the title might not have been regularly executed by the administrators de bonis non, under the order which had been granted, we would still hesitate, under the influence of the reasons suggested, to sustain this exception as to mere matter of form.

I believe that this Court, from its earliest organization—certainly from the time when I first had the honor of a seat upon its bench, has steadily discountenanced these technical exceptions, which do not affect the merits of the case, and I wonder that Counsel have not wearied in bringing them here.

Whilst the members of this Court have required that forms should be sufficiently accurate, plainly and distinctly to set forth what is meant, and have sometimes sustained exceptions when they were not so, yet, they have set their faces, as flint, against other objections of a technical and hypercritical character.

I hope that they may continue thus to administer the law. That by the breath of their opinions they may scatter the withered leaves of barren forms, the dust of antiquated technicalities, and may frame their judgments upon the firm and lasting foundations of reason and substance.

I cannot utter a better last wish from this bench, for the usefulness and welfare of this Court.*

Let the judgment be reversed.

^{*}Though not last of the cases in order upon the calender of this term, in which Judge Starms delivered the judgment of the Court; yet, this was the last case, in order of argument and judgment, of the cases in which the opinion was pronounced by him, before retiring from the bench.

Reference.

No. 35.—ELIJAH MATTOX, plaintiff in error, vs. M. J. BRY-AN, defendant in error.

[1.] When a verdict is strongly and decidedly against the weight of evidence, much more when it is without evidence, will a new trial be granted.

Ejectment, in Clinch Superior Court. Tried before Judge Love, June Term, 1855.

This action was brought by Elijah Mattox, against M. J. Bryan, for the recovery of lots 574 and 575, in 13th district of Appling County, originally. On the trial, he offered in evidence grants from the State to him, to the lots aforesaid, and the following testimony:

LUCIUS C. MATTOX: Proved that he knew lots Nos. 574 and 575, and that he knew that they were in the 13th district of Clinch County; that he knows that the defendant was certainly in the possession of the southern part of one, to-wit: No. 575; and he believed that he was in possession of the southern part of No. 574; he could not say precisely how much he was in possession, but he thought about one hundred acres: that he had traced and found the southern line of both lots, and found the corner. The stations and lines were distinctly marked, and corresponded with the lines on the plots of the grants; and he knows that the defendant was in possession of a portion of the said lots when this suit was instituted and served on him. In tracing the lines, witness saw marks on trees considerably to the north of the southern line of the grants, and it might have been a line; but witness does not know what line. I am son of plaintiff, and the lines were. seen by my father, as testified by me. He was not county surveyor.

JOHN J. MATTOX: Proved that he had traced the lines around both the lots, and found them to correspond to the lines of the plots; witness found the southern corners, and traced the southern line through both lots, and knows that defendant is in possession of the southern portion of said lots;

Mattox vs. Bryan.

thinks about one hundred acres, and was in possession when this suit was instituted and served; knows that both lots are in Clinch County, and in the 13th district; witness found no other station on the southern line of the lots, but the corner stations. I am son of the plaintiff.

ISHAM F. JOHNSON: Proved that he assisted the plaintiff in running the southern lines of both lots, and found the corners and the southern lines of both lots, and found them to correspond to the lines of the plots to the grants. The lines were distinctly to be seen. Both lots are in Clinch County. Witness saw no station tree, in tracing the lines. I am brother-in-law to plaintiff.

The plaintiff here closed, and the defendant introduced ROBERT BROWN, who proved that he was the surveyor of Columbia County, Florida, and that he surveyed for the defendant the northern line of Florida, as run by the United States surveyor, Hodson, and found that the possessions of the defendant was about three hundred yards south of that line; he had a plot of his survey, which was read in evidence to the Jury. He said that the northern line of his plot was the Florida and Georgia line, as claimed by Florida, and that defendant's possessions were below that line. He said he knew nothing about the lines of the plots to the grants, whether they were above or below his line; nor did he know whether the defendant was or not in possession of any of the land included within the said grants.

JOSEPH FLETCHER: Proved that he was with Mr. Brown when he made his survey, and that the line, as marked by him, is the line that is considered the Florida line by the citizens of Florida; and that defendant's possessions are about three hundred yards to the south of that line. He said that he knew nothing about the lines of the plots attached to the grants, and did not know whether the defendant was or not in possession of any of the land included in said grants. He knew nothing about the plaintiff's land.

JOSIAH D. CLINTON: Proved that he was present at the survey by Mr. Brown, and that the defendant's possession

was about three hundred yards to the south of the Florida and Georgia line, as run by Mr. Brown; he said he knew nothing about the lines to plaintiff's grants, and did not know whether the defendant was in possession of any of the land included within said grants or not. Knew nothing about plaintiff's land. Brown, Clinton and Fletcher each swore that they did not see any line running across the line surveyed by Brown, though they did not examine for any such lines. Brown found the corners of the fraction and township survey of Florida, as made by Hodson.

JAMES T. DAGGET: Proved that he was present when the survey was made by Brown, and that the possessions of the defendant were about three hundred yards to the south of the line as run by Mr. Brown for the Florida and Georgia line. He said he knew nothing about the lines of the lots, as marked in the plots of the plaintiff's grants, and did not know whether the defendant was or not in possession of any of the lands included in said grants.

To the introduction of all the defendant's evidence, and before it was introduced, the plaintiff objected, on the grounds that it was incompetent and irrelevant to the issue, but the Court over-ruled the objections, and plaintiff excepted.

The Jury returned a verdict for the defendant; whereupon, Counsel for the plaintiff moved for a new trial, on the following grounds:

- 1st. Because the Jury found contrary to the evidence, and without evidence, against the evidence, and decidedly and strongly against the weight of the evidence.
- 2d. Because the Jury found contrary to law and contrary to the charge of the Court.
- 3d. Because the Court erred in permitting the defendant to go into evidence as to the Florida and Georgia line, as surveyed by Hodson, under the authority of the United States, and as re-surveyed by Robert Brown for the defendant; which motion was over-ruled by the Court, and Counsel for the plaintiff excepted.

On these exceptions, error was assigned.

Mattox vs. Bryan.

Cole, for plaintiff in error.

L. Stephens, representing T. T. Long, for defendant.

By the Court.—LUMPKIN, J. delivering the opinion.

[1.] There are but two questions in this case: 1st. Was: the testimony on the part of the defendant relevent to the issue? And secondly. With that testimony, was not the verdict strongly and decidedly against the evidence; and excluding that testimony, wholly without proof?

1. The issue to be tried was, whether the grants from the State of Georgia to Elijah Mattox, the plaintiff, to lots Nos. 574 and 575, in the 13th district of originally Appling, now Clinch County, covered the premises in dispute, to-wit: The possession of M. J. Bryan, the defendant? The proof in behalf of the plaintiff showed conclusively that they did. And what was the rebutting testimony offered by the defend-He introduced sundry witnesses, who swore, and nodoubt truly, that the possession of Mr. Bryan was about three hundred yards south of the northern line of Florida, as run by the United States' surveyor. But whether the lines of the Georgia grants extended beyond this boundary, and embraced the possession of the defendant, neither Mr. Brown, Mr. Fletcher, Mr. Clinton or Mr. Daggett could state. In other words, and this seems to have been the wholedrift of the proof, these witnesses made it manifest that the locus in quo was in Columbia County, Florida, provided Hodson's be the true boundary line between the two States. And this is all that the evidence of the defendant did establiah.

It is apparent, therefore, that it was wholly immaterial and inapplicable to the case made by the pleadings, and should have been rejected. The only question submitted to the Jury was, not which was the true boundary line which separates this State from her southern sister, (a point to be settled

only by the Supreme Court of the United States, and now pending before that tribunal,) but the only fact to be found was, had Mr. Bryan trespassed upon the land covered by the Georgia grants? We repeat, that every witness examined on the part of the defendant, expressly disclaimed having any knowledge upon this subject.

2. On the other side, the proof is positive, accumulative, unimpeached, and, as we have seen, uncontradicted. Lucius C. and John J. Mattox, sons of the plaintiff, and Isham F. Johnson, his brother-in-law, traced the lines of the grants and found them distinctly marked and corresponding with the lines as marked in the plots. They found the defendant to be in possession of about one hundred acres of the southern portion of the two lots.

Upon the proof, there could be but one legal finding. And the verdict being entirely without evidence to support it, a new trial should have been granted.

11

No. 86.—Elias Branch, plaintiff in error, vs. John Riley, defendant in error.

[1.] After a f. fa. has been levied, a claim interposed under our Claim Laws, and returned to Court, the Sheriff has no right to withdraw the execution at his pleasure; but the same must be withdrawn (if at all) by leave and order of the Court, granted in his discretion.

Rule, in Appling Superior Court. Decision by Judge Love, June Term, 1855.

A fi. fa. in favor of John Riley against John T. Hall, was levied by the Sheriff of Appling County, upon a negro woman, and a claim was interposed thereto. Pending the claim,

Branch vs. Riley.

Counsel for plaintiff in f. fa. gave to the Sheriff written instructions to proceed to collect the money thereon. The Sheriff failing to make another levy, he was ruled therefor, and the Court below held him responsible for the amount due on the fi. fa. This decision is assigned as error.

Cole, for plaintiff in error.

I. L. HARRIS, representing GAULDEN, for defendant.

By the Court.—STARNES, J. delivering the opinion.

The Sheriff has no right, at his pleasure, to withdraw for any purpose a f. fa. which has been levied, and after claim interposed, returned into Court.

It would be a bad rule, however, which held, that after a levy and claim in our State, no other levy can be made of the same execution, until the claim is tried and determined. There might be very good reasons why another levy should be made, even where the first had been upon property sufficient to pay the debt; so that, in our opinion, the plaintiff is not, and should not be, deprived of the privilege of withdrawing the fi. fa. and of having another levy made upon it, should the purposes of justice render this proper. Yet, this privilege should not be exercised capriciously, or so as to harrass and oppress the defendant.

To prevent this and advance justice, the right so to withdraw the execution after claim interposed and returned, should be submitted to the sound discretion of the Court before whom the case is pending. The fi. fa. should therefore be withdrawn by leave and order of the Court, after a satisfactory showing made by the plaintiff. And if the latter desire to withdraw the execution and direct another levy, he should apply to the Court for such leave; he has no right to require the Sheriff to do this for him; and the Sheriff, having

no right, of his own volition, to withdraw the process, he cannot properly be held in contempt for not doing so.

Let the judgment be reversed.

No. 37.—ROBERT FINDLAY, plaintiff in error, vs. NANCY ROBERTS, defendant in error.

[1.] The lien given by the Act of 1842, (Cobb's Dig. 428) to mill-wrights and others, is a lien confined to the steam saw-mill. The lien does not extend to any land except the mill-site, and any other that may be necessary to the working of the mill.

Application for dower, in Baldwin Superior Court. Decision by Judge HARDEMAN, August Term, 1855.

The following facts were agreed upon in the Court below: On 28th October, 1853, Robert Findlay filed his lien upon mill and the premises annexed thereto, belonging to John Roberts, for an engine erected by Findlay and attached to the mill. Subsequently, Roberts died, and his widow applied for dower in the lot of land on which the mill was erected.

Judge HARDEMAN decided that the widow was entitled to her dower, to be estimated without taking into computation the value of the machinery and works erected by Findlay, and be so laid out as to exclude the mill, engine and fixtures.

To this decision Findley excepted.

I. L. HARRIS, for plaintiff in error.

HULL, representing WINGFIELD, for defendant in error.

Findlay vs. Roberts.

By the Court.—BENNING, J. delivering the opinion.

[1.] What was the extent of Findlay's lien? Was it confined to the mill, or did it also extend to the tract of land on which the mill stood?

The question depends on what is the meaning of two Statutes—the Acts of 1841 and 1842—on the subject of lien. (Cobb's Dig. 426, 428.)

The Act of 1841 declares, that all persons employed in any capacity on steamboats and other water craft, &c. shall, for their wages, &c. have "an exclusive lien on said steamboat, against the owner," superior in dignity to any other incumbrance.

Thus, it is seen that by this Act, the lien is to be on the steamboat.

The Act of 1842, is to amend this Act, and for other purposes. It declares, that all the provisions of this Act "shall apply to all steam saw-mills at or near any of the water courses in this State, in behalf of all and every person or persons who may be employed by the owner or owners, &c. for services rendered," &c. and in behalf of mill-wrights.

**All the provisions of the Act of 1841 "shall apply to steam sum mills." That is, the Act of 1842.

Mow can that provision of the Act of 1841, above quoted, be made applicable to a steam saw-mill? How, except by making the lien attach to the steam saw-mill, in the same way that the Act of 1841 makes the lien attach to the steam-boat? We can see no other way. It certainly cannot be done by making the lien attach to all of the land that may be in the tract on which the mill stands. The Act of 1841 has in it nothing about land. The Act of 1842 has in it nothing about land, except such land, if any, as is included in the word mill—"steam saw-mills." And no more land can be included in that word than the site, and whatever else may be necessary for the working of the mill. The Act of 1841 has in it, therefore, nothing which can be applied to any other

Fitts vs. Rose et al.

dand than what can be included in the word steam saw-mill. It follows, that the lien which the Act of 1842 gives, is a lien confined to the steam saw-mill.

If this be so, the judgment of the Court below must be affirmed, for that judgment does not at all interfere with the plaintiff's lien on the steam saw-mill.

It is of course unnecessary to consider the question, what was the nature and extent of the widow's dower. She does not complain.

No. 38.—JOHN B. FITTS, plaintiff in error, vs. JAMES P. Rose and others, defendants in error.

[1.] The fee bill of 1792, regulating the commissions to be allowed the Sheriff, does not look to the amount of sales alone as the measure of compensation.

Rule, in Putnam Superior Court. Decision by Judge HARDEMAN, September Term, 1855.

The only question in this case, was as to the commissions of the Sheriff upon the amount of sales made by him. It appeared that the amount of the sales was \$3.890, and that the sale was made by virtue of sundry fi. fas. varying in amount. The Sheriff claimed his commission upon each fi. fa. varying according to the amount. The Court held that the Sheriff was entitled to one and a fourth per cent. on the whole amount, and no more. This decision is assigned as error by the Sheriff.

HUDSON, for plaintiff in error.

No appearance for defendants in error.

Fitts vs. Rose et al.

By the Court.-LUMPKIN, J. delivering the opinion.

[1.] It is difficult to execute, literally, the fee bill of 1792, and the Acts amendatory thereof, from the fact that the Legislature evidently had in their mind a case only where money should be raised upon a single fi. fa. In such case, it is a simple proceeding to graduate the commissions according to the size of the execution. That is, in the language of the law, "On all sums where the execution does not exceed 64 dollars and 28 cents, 6½ per cent. on the amount of property sold; on all sums above 64 dollars and 28 cents, where the execution does not exceed 428 and 56 cents, 3½; and on all sums where the execution exceeds 428 dollars and 56 cents, 1½." (Cobb's Digest, 350, 351.)

In this case, near four thousand dollars was raised from the sale of the defendants' property, and paid over to the various liens in the hands of the Sheriff, consisting of executions and orders in attachment; of which seventy-three were in amount under sixty-four dollars and twenty-eight cents; and eight exceeded sixty-four dollars and twenty-eight cents, and were under four hundred and twenty-eight dollars and fifty-six cents. There were no fi. fas. or attachments above that sum.

Judge HARDEMAN, with that strong sense of right which usually characterizes his decisions, and considering what the law ought to be, namely: to fix the fees by the amount of sales, irrespective of the size of the process, restricted the commissions to 1½ per cent. And we believe that a similar rule has been adopted in other circuits. And yet, perhaps, there is none which is a wider departure from the letter of the Statute, as it is written. While the Act remains as it is, some practice must be pursued which will have reference to the amount of the liens under which the property is sold; otherwise, the law is set at naught.

In some of the Judicial Districts, the plan has been to allow commissions on every f. fa. according to the amount

Hansell vs. Bryan, ex'r, &c.

thereof; and while this construction best subserves the letter of the law, and is, perhaps, in accordance with the rule suggested by this Court in Aycock vs. Buffington, (2 Kelly, 268,) still, in our opinion, the compensation is excessive in a case-like the present, where there are seventy-three executions and attachments under 64 dollars and 28 cents. In every such case, the lion's share of the proceeds goes to the officer.

If we were at liberty to prescribe a rule, which would meet the justice of the case, and at the same time comply with the spirit of the Statute, it would be this: That up to the sum of 64 dollars and 28 cents, the Sheriff should receive 6½ per cent.; between that amount and 428 dollars and 56 cents, 3½; and upon the balance of the fund 1½. And we are clear, that in no case should commissions be charged upon the surplus remaining in the hands of the Sheriff. He is prohibited, under severe penalties, from making excessive levies. And it is impolitic to tempt him to violate his duty.

No. 39.—Augustin H. Hansell, plaintiff in error, vs. Ben-Jamin Bryan, executor, &c. defendant in error.

^[1.] Where, by an exemplification of the record, it appears that there had been a probate of the will, and the same was admitted to record, though there was no formal judgment of the Ordinary pronouncing for the will, the Superior Court should presume in favor of the Court of Ordinary, (at least until the contrary is shown,) that the will was admitted to record by the judgment or direction of the Ordinary.

^[2.] Where A claimed under a verbal gift from B to his sen, which it was sought to prove, by declarations of B, was made at some period previous to the declarations; and where it was also shown that the property continued in the possession of B: *Held*, that other sayings, inconsistent with such a gift by B, at other times, made while he continued in possession, were admissible as evidence for the opposite party.

^[3.] Such declarations by the father, may as well be relied upon to show

Hansell vs. Bryan, ex'r, &c.

that there had been a perfect gift; that is to say, a gift by words, accompanied with delivery, as to prove that there had been a gift by words only.

Trover, in Pulaski Superior Court. Tried before Judge Love, April Term, 1855.

This action was brought by Benjamin Bryan, as executor of Joseph M. Bryan, deceased, vs. Augustin H. Hansell, for several negroes. On the trial, the plaintiff offered in evidence an exemplification from the Ordinary of the probate and record of the will of his testator. Counsel for defendant objected to the evidence, on the ground that there was no judgment of the Court of Ordinary pronouncing in favor of the will and ordering it to record. The Court over-ruled the objection, and this decision is assigned as error.

Plaintiff below then proved by sundry witnesses, the sayings of one Blackshear Bryan, that certain property, including that sued for, "belonged to" his son Joseph; "was the property of his son;" and also some acts of Blackshear Bryan, showing an acknowledgment, by him, of property in his son.

Defendant below then offered in evidence testimony going to show other sayings of Blackshear Bryan, at other times, denying property in his son. This evidence was ruled out by the Court, and this decision is assigned as error.

The Court charged the Jury, among other things, "when the gift is established, either by actual delivery or from acts by which it can properly be inferred, the possession of the father becomes the possession of the child. This charge is assigned as error.

The value of the negroes was alleged, in the petition, to be \$6.000; the damages were laid at \$12.000; the verdict was for \$7.800. Defendant below moved in arrest of judgment, because the verdict exceeded the value laid in the petition. The Court refused the motion, and this decision, also, is assigned as error.

Cole, for plaintiff in error.

I. L. HARRIS, for defendant in error.

By the Court.—STARNES, J. delivering the opinion.

[1.] We agree with the Court below, in the opinion, that the fact of there being no formal entry of a judgment by the Court of Ordinary, pronouncing for the will, was not a sufficient objection to the admission of the exemplification which was offered.

The practice of our Courts of Ordinary, in this particular, is not very well settled, so far as form is concerned. This exemplification shows, however, that there was a probate of the will, and that the same was admitted to record in the proper Court. In favor of that Court as a co-ordinate branch of the Judiciary Department of this State, we must presume, until the contrary is shown, that what thus appears to have been done by it, was done legally.

The direction by the Court, that the will should be admitted to record, must therefore be presumed; and this direction was the thing of substance in the premises; the form of doing it was not very material.

[2.] The depositions of Dr. Townsend, stating certain declarations of Blackshear Bryan, to the effect that the slaves sued for were the property of his son, as well as other declarations to this effect, which were offered in evidence, should have been admitted.

It will be observed, that no evidence was submitted in the case, of a positive gift by Blackshear Bryan to his son, of these slaves, and a delivery of them at any particular time; but it was sought to have it presumed from the sayings of the father on various occasions, that the slaves had been derived by his inter-marriage with the mother of his son, and that they were the property of this son; that there had been, at

Hansell vs. Bryan, ex'r, &c.

some previous time, a gift of them to the son. The declarations were not relied upon as proving a gift at the time they were uttered, but as going to show that a gift had been made at some prior point of time.

It was in consideration of this fact, and of the circumstance that Blackshear Bryan continued in possession of the slaves, that we thought his subsequent sayings might be looked to as a part of the res gestæ, from all of which it might be determined whether or not it was probable that he had ever made a gift of the slaves to his son.

If declarations by the father, at any particular time uttered, had been proven, so as to show that at that time he had made a gift of the slaves to his son, then perhaps testimony of his sayings denying the gift, would not have been admissible. But that was not the case here. As we have said, the declarations were relied upon as showing that a gift had been, at some prior point of time, made; there was a continuing possession by the father, and subsequent statements were made by him, inconsistent with the idea that he had ever parted with dominion over the property.

In this point of view it is, that we think such subsequent declarations were proper evidence.

It is true that this continuing possession of the father may not be inconsistent with the fact of a complete gift from his to his son; but it was for the Jury to decide whether or not this possession of the father was a possession for the son. There was the fact that the father did continue in possession, and we think, that under the circumstances, what he said whilst so continuing in possession, should have been submitted to the Jury.

[3.] We cannot agree with the Counsel for the plaintiff in error, that the Court erred in submitting the question to the Jury, whether or not there had been a delivery by the father; to the son, because there was no evidence to show delivery.

We do not mean to pronounce an opinion upon the strength of this evidence, nor to say what it does or does not prove. But this we do say: that if these declarations of the father

Jones, adm'r, &c. vs. Beall.

might be received as possibly affording presumptive evidence of a gift by words only, at some previous time made, they might, at the same time, be examined as possibly proving all that was necessary to constitute a gift; and therefore, as showing that there had been a delivery of the slaves.

The simple question was, whether or not these sayings of Blackshear Bryan did prove that there had been a gift; that is to say, all that was necessary to constitute a gift—apt words and delivery, or that which was equivalent to delivery. And to decide this, the Jury were authorized to consider what was said by the father, the fact of his continued possession, the circumstance of his son's minority and residence with his father, and whether or not this accounted for the possession of the father, and showed that it was consistent with the son's property in the slaves.

Let the judgment be reversed.

No. 40.—Jesse M. Jones, adm'r, &c. plaintiff in error, vs. Erastus Beall, defendant in error.

[71.] R B having been stabbed by L, requested his brother, A B, to employ Counsel and prosecute L for the stabbing, telling A B that whether he lived or died, he, A B, should be paid. R B died. After his death, A B employed and paid Counsel to prosecute L: Held, that by the death of R B, the request was revoked, and that therefore, A B was not entitled to recover from R B's administrator, what he had paid to Counsel to prosecute the case against L.

Assumpsit, in Warren Superior Court. Tried before Judge T. W. Thomas, October Term, 1855.

This action was brought by Erastus Beall, against the administrator of Robert Beall, upon the following facts:

Jones, adm'r, &c. vs. Beall.

One John Lovett stabbed Robert Beall. Robert Beall requested his brother Erastus to employ Counsel and prosecute Lovett for this offence, and told him that whether he lived or died, he should be paid. Robert Beall died. Erastus Beall, after the death of Robert, employed Counsel and prosecuted Lovett, and paid therefor the sum of \$175. This action was against the administrator, to recover this amount. The Court below charged the Jury, that the plaintiff below was entitled to recover the same, with interest thereon; and this decision is assigned as error.

GIBSON; JONES, for plaintiff.

COBB, representing POTTLE, for defendant.

By the Court.—Benning, J. delivering the opinion.

[1.] Was the request which Robert Beall made of his brother, Erastus Beall, revocable? And was it revoked by the death of Robert? This is the only question.

It appears that Erastus Beall did nothing under the request, until after the death of Robert.

It does not appear that Erastus Beall bound himself, in any way, to comply with the request. If, therefore, he had never complied with it, Robert Beall, even if he had lived, could not have had an action against him, for the failure. Of course Robert's executors could not.

A request of such a nature as this, whether we call it a matter of contract or a matter of agency, is, we think, revocable at any time before it is acted on.

It is said in Addison on Contracts, (36) that "in all cases where there is no mutuality of contract and obligation, there is nothing to bind the party to the continuance of his promise, so long as nothing has been done upon the faith of it; and the party making the promise, or giving the undertaking, may, at any time before it has been accepted and acted upon, and any portion of the intended consideration has been ac-

Jones, adm'r, &c. vs. Beall.

complished, retract such promise or withdraw such undertaking, and place himself in the same situation as if it had never been made."

This, we think, is law.

This request, therefore, we think was one which might have been revoked at any time before it was acted on. If Robert Beall had lived, can there be a doubt that he would not have had it in his power to dispense with the services of his brother and attend to his own case for himself?

Was the request revoked? We think it was. Before any thing was done under it, the author of it, Robert Beall, died. Death is a revocation of an agency; and a request which is revocable, cannot amount to anything of a higher nature than that of an agency. It cannot have in it more of vitality than an agency has.

But, indeed, it is by no means inconsistent with what passed between these brothers, to say that the intention of Robert was to create an agency and nothing else. At the time when Robert made this request of his brother, it does not appear that he expected to die of the wound which he had re-The most that can be said on that subject is, that he had apprehensions that death might result from the wound. If we say that the expectation of living was stronger with him than the fear of dying, then I think we must say that all he wanted with his brother was, that his brother should act as his agent until he so far recovered from his wound that he could act as his own agent. Doubtless he wanted the prosecution to commence instantly. That it might commence instantly, an agent was necessary, even if it should turn out that he, himself, would be well again in a few days; but, in that event, nothing more than such a temporary agent would be necessary; for as soon as he should recover he, himself. would be, in all respects, a better agent than any other to attend to the prosecution. Not only is this so, but it is a fair presumption, that if he recovered he would not be disposed to yield the office of prosecutor to any one. So that if we can say that Robert expected to live, we have to say

that his design was to create nothing but an agency—an agency to last through the period of his illness, and no longer. This we can say, at least, as easily as we can say that he expected to die.

Upon the whole, therefore, we are constrained to say that we think the request was revoked by the death of the maker of it, Robert Beall—that death occurring before the request had been acted upon by Erastus Beall, to whom it was preferred. And as in this we differ from the Court below, we have to order a new trial.

- No. 41.—John W. Burch and others, plaintiffs in error, vs. John C. Burch, ex'r, &c. defendant in error.
- [1.] The executor of an only surviving executor, is the representative of the original estate, notwithstanding a portion of the will could not, by any possibility, be executed until the death of the original executor.
- [2.] Where the testator directs a sale of his whole estate, and the provisions of the will show that he contemplated such sale to be made by his executor, the Ordinary should not refuse to grant letters testamentary, because a portion of the legatees suggest, by caveat, that they desire to take the estate in kind, dispensing with the sale.

Caveat on appeal, in Elbert Superior Court. Tried before Judge T. W. Thomas, at September Term, 1854.

The questions in this case arose upon the application of John C. Burch, as the executor of Mrs. Elizabeth Burch, for letters testamentary upon the estate of William S. Burch, deceased. To this application John W. Burch and others, a portion of the legatees under the will, entered a caveat upon the grounds:

1st. That John C. Burch, as executor of Mrs. Burch, was

not entitled to the letters upon the estate of William S. Burch.

2d. That the will of William S. Burch had been fully executed, and there was no necessity for a representative to said estate.

The following are the wills of William S. Burch and Elizabeth Burch:

In the name of God, amen!

I, William S. Burch, of the State of Georgia and County of Elbert, being weak and infirm in body, but of sound mind, memory and understanding, do make and publish this my last will and testament, in manner and form following, to-wit:

First. I recommend myself to God the giver and Creator of all good, sincerely thanking him for all blessings, civil and religious, conferred upon me during my existence in this changeable and uncertain life.

Item. My will is, that all my just debts be paid.

Item. I lend to my beloved wife, Elizabeth, the whole of my estate, both real and personal, during her natural life or widowhood; but if she chooses to marry, then and in that case my will is, that the whole of my estate be taken out of the hands of my said wife, Elizabeth, by my executors, which I shall hereafter name, and be equally divided by appraisement, into three equal shares, share and share alike, and that my said wife Elizabeth take her choice of one share, or one third part of my estate so divided as aforesaid, which share or the one third of my estate so divided as aforesaid, I lend to my said wife Elizabeth after her second marriage, during her natural life; and that the share or one third part of my estate so lent my said wife Elizabeth, be under the management, direction and control of my said executors, for the support of my said wife Elizabeth, after her second marriage, so long as she shall live; and at her death, that the said share or one third part of my estate, so lent my said wife-Elizabeth, after her second marriage, under the directions of my executors, to be sold and the monies arising from said

sale to be put into four equal shares, share and share alike; one share or one fourth part of the said monies, I give and bequeath to be equally divided betwixt the whole of the children of Sarah Harden, wife of Henry Harden, she, the same-Sarah being sister to my said wife Elizabeth, and is to them, the said children, share and share alike, forever; one othershare or one fourth part of said monies I give and bequeath to be equally divided betwixt the whole of the children of Polly Wilbourn, wife of Thomas Wilbourn, she, the said Polly being sister to my said wife Elizabeth, and is to them the said children, share and share alike, forever; one other share, or one fourth part of said monies, I give and bequeath, to be equally divided betwixt the whole of the children of Rebecca Upshaw, wife of John Upshaw, Junior, she, the said Rebecca being sister to my said wife Elizabeth, and is to them, the said children, share and share alike, forever; the other share, or one fourth part of said monies, I give to be equally divided betwixt Mary Ann Cook and William T. O. Cook, heirs of William T. Cook, deceased, he, the said William, being brother to my said wife Elizabeth, and is to them the said. Mary Ann and William T. O. Cook, share and share alike, forever.

Item. My will is, that if my said wife Elizabeth should marry, then and in that case, I lend to my sister Betty Cook, one other share or third part of my estate, so divided by appraisement as aforesaid, during her natural life, for her support, which share or third part of my estate, so lent to my said sister Betty, be under the management, direction and control of my executors, for the support of my said sister Betty, so long as she shall live.

Item. If my said wife Elizabeth should marry, then and in that case, my will is, that the other share or one third part of my estate, so divided by appraisement as aforesaid, he so sold, and the monies arising from the said sale be equally divided betwixt my brothers and sisters (to-wit:) Thomas Burch, Benjamin Burch, Maza Burch, John Burch, Chèsdle Burch, Polly Johnson, Jenney Divine, Hannah C. Purkins

and Sarah Kesee, and is to them, my said brothers and sisters, share and share alike forever; but if either of my said brothers or sisters should decease, leaving no child or children, then and in that case my will is, that their part of said legacy be equally divided betwixt the whole of my brothers and sisters above named, and is to each of them forever.

Item. And in case that my said wife, Elizabeth, should not. marry, then and in that case my will is, at her death, the whole of my estate, both real and personal, be sold and the monies arising from the same to be put into three equal shares, share and share alike. One third part of the monies arising from the sale of the whole of my estate, I give to the children of Sarah Hardin, Polly Wilburn, Rebecca Upshaw and the two heirs of William T. Cook, as above mentioned: but if either of the above named sisters to my said wife, Elizaboth, should die, having no child or children, then and in that case, for their part of said legacy to be equally divided betwixt the surviving children of the above named sisters to my said wife Elizabeth; and if either of the above named heirs of William T. Cook should die, leaving no child or children. for the other one to receive his legacy; and if both of the said heirs of the said William T. Cook should die, leaving no child or children, then and in that case, for their legacy to beequally divided betwixt the surviving children of the above named sisters of my said wife Elizabeth.

Item. One other share or one third part of the monies so arising from the sale of the whole of my estate, I lend to my sister, Betty Cook, during her natural life, for her support; but the said share, or one third part of my estate so lent, be under the management, direction and control of my said executors, for the support of my said sister Betty, so long as she shall live.

Item. The other share, or one third part of the monies so arising from the sale of the whole of my estate, I give and bequeath, to be equally divided betwixt the whole of my above

named brothers and sisters, in manner as above mentioned, and is to each of them forever.

Item. At the death of my sister, Betty Cook, my will is, that the share or one third part of the monies arising from the sale of the whole of my estate, so lent her under the management, direction and control of my said executors, I give and bequeath to be equally divided betwixt the whole of my above named brothers and sisters, in manner as above mentioned, and is to each of them forever.

Lastly. I appoint my well beloved wife, Elizabeth, executrix, and my trusty friend, John Upshaw, Junior, and William Woods, executors of this my last will and testament, utterly revoking all will or wills heretofore made by me.

In testimony whereof, I do hereunto set my hand and seal, this 15th day of May, in the year of our Lord One Thousand Right Hundred and Seventeen. Signed, sealed and delivered by the testator, as his last will and testament.

WILLIAM S. BURCH, [SBAL.].

In presence of
JOB WESTERN,
BAILEY M. WOODS,
WILLIAM WOODS.

GEORGIA, ELBERT COUNTY:

In the name of God, amen: I, Elizabeth Burch, of said. County and State, being of sound mind, but feeble in body; and having long ago passed the period of life allotted to the human race, do make and publish this to be my last will and testament, hereby revoking all others.

Item 1st. I desire all my just debts to be paid without delay, if I should leave any unpaid at the time of my death.

Item 2d. I give and bequeath unto my neice, Mary Ann Burch, widow of Benjamin Burch, and her three children, to be equally divided between them, share and share alike, all the property, real and personal, debts, dues and demands, and all other property, of every kind whatever, which I may die possessed of, or have any right, title or claim to at my death, as

my said neice, Mary Ann Burch, has been a faithful companion and friend to me for many years; and I feel that I shall never be able to repay her for her increasing kindness, care and attention to me in my old age.

Item 3d. I nominate and appoint William B. Bowen and John C. Burch, to be executors of this my last will and testament, with all the rights, powers and privileges which my executors may have or lawfully claim.

In testimony whereof, I have hereunto set my hand and seal, this 8th day of February, in the year 1853.

her
ELIZABETH ⋈ BURCH.
mark.

Signed, sealed and published as her last will and testament, in our presence; and signed by us as witnesses, in presence of testatrix and in the presence of each other, the day and date of said will.

THOMAS W. THOMAS, ASA CHANDLER, DANIEL M. CARLTON.

GEORGIA, ELBERT COUNTY:

I, Elizabeth Burch of said County and State, being of sound mind, but feeble in body, do make and publish this as a codicil to the foregoing will, hereby ratifying and confirming the aforesaid foregoing will, except wherein the same is altered by this codicil.

Item 1st. In addition to the property bequeathed to my neice, Mary Ann Burch, widow of Benjamin Burch, in the foregoing will, I give to her my carriage, carriage horses and harness, over and above her equal share.

Item 2d. Whereas, in said foregoing will, William B. Bowen is named as one of my executors, and whereas he has removed out of the State of Georgia, I hereby nominate and appoint my other named executor, John C. Burch, to be sole executor of my said last will and this codicil, with all the rights, powers, privileges and interests into and over my es-

tate, and into and over the estate of my last hasband, William S. Burch, which my executors may lawfully have or claim.

In testimony whereof, I have hereunto set my hand and seal, this 21st of June, 1855.

her
ELIZABETH M BURCH.
mark.

Signed, sealed and published by the testatrix, in our presence, and signed by us as witnesses, in the presence of the testatrix and in the presence of each other, the day of the date of said will.

THOMAS W. THOMAS,

his HENRY ⋈ ADAMS, mark. ASA CHANDLER.

The following were the facts agreed on:

It was admitted by John W. Burch and others, defendants in the above cause, that Elizabeth Burch, the executrix of said will of William S. Burch, survived both the executors of said will of William S. Burch, and that the records of the Court of Ordinary contained no evidence of any other returns being made by the executors of the will of the said William S. Burch, after the probate of the will, than an inventory of said estate, returned at the May Term of the said Court of Ordinary, 1822, and one made by William Woods, of the payment of debts of said estate, made to the November Term of said Court of Ordinary, 1823; that Upshaw, one of the executors of Wm. S. Burch, died before the testator, Wm. S. Burch, and that Elizabeth Burch and William Woods qualified as executors of said estate.

Also, on the trial of said cause, it was admitted by John C. Burch, the applicant in said cause, that the executors of William S. Burch's will, including Elizabeth Burch, executrix, proved the will of said William S. Burch, in the Court of Ordinary in said County of Elbert, and that it was admitted to record at the January Term of the Court of Ordinary

of said county, 1822, and that said executors returned an inventory of the estate of William S. Burch, at the May Term of said Court of Ordinary thereafter; and that William Woods, one of the executors of said will, made a return to the November Term, 1823, of said Court of Ordinary, of debts of said estate, paid by him as such executor; that said Elizabeth Burch remained in possession of the estate of the said William S. Burch, with the consent of the executors, from the death of the testator until her own death, and that she died on the 1st day of July, 1855.

The cause closed. Counsel for John W. Burch and others, defendants, asked the Court, in writing, to charge the Jury, that if they believed that Elizabeth Burch was permitted, by the executors, to possess and enjoy the estate of William S. Burch during her lifetime, that such possession and enjoyment of the property by her, is evidence of the assent of the executors to her receiving said estate in compliance with the will of said William S. and in execution thereof; and that if they believe she received said estate into her possession and enjoyed it during her life, with the consent of the executors, that such consent operated in behalf of those who, by the will, take after her death, so as to vest the title to the estate. after her death, in them, and leaves no ground, in law, for the granting of the application of said John C. Burch, now before them, and they should find against him. The Court refused so to charge, but on the contrary, charged the Jury as follows:

"Gentlemen of the Jury: In Blackstone's Commentaries, I find this principle laid down: 'the interest vested in the executors by the will of the deceased, may be continued and kept alive by the will of the same executor, so that the executor of A is, to all intents and purposes, the 'executor and representative of A himself; but the executor of A's administrator or the administrator of A's executor is not the representative of A; for the power of an executor is founded upon the special confidence and actual appointment of the

deceased; and such executor is therefore allowed to transmit that power to another in whom he has equal confidence; but the administrator of A is merely the office of the Ordinary, prescribed to him by Act of Parliament, in whom the deceased has reposed no trust at all; and therefore, on the death of that officer, it results back to the Ordinary to appoint another.' No new light has been shed upon this case, which causes me to doubt that these principles apply to and control the issue before you. If you believe that Mrs. Elissbeth Burch, at the time of making her will and codicil, was the sole surviving qualified executrix of Wm. S. Burch, deceased, and that she appointed John C. Burch, the applicant, her sole executor, then he is entitled, by law, to administer and manage as executor of the estate of Wm. S. Burch; also the express bequest to him of such right and, power, in the will and codicil of Elizabeth Burch, was no more efficacious to vest the same in him than his simple appointment as execntor would have been.

"I have been requested by defendant's Counsel to charge the Jury, that if they believe that Elizabeth Burch was permitted, by the executors, to possess and enjoy the estate of Wm. S. Burch during her lifetime, that such possession and enjoyment of the property by her, is evidence of the assent of the executors to her receiving said estate, in compliance with the will of the said William S. and in execution thereof. My response to this request is, that it is good law in a case to which it applies, but it has no application to the issue you are to try. The question for you, is not whether the will of Wm. S. Burch has been rightly executed in behalf of Elizabeth Burch, who, it seems, was entitled to a life estate in the whole, but who is entitled to execute it in behalf of the remainder-men, who take after her death.

"The request made by defendant's Counsel, proceeds as follows: and that if they (the Jury) believe she (Elkabeth Burch,) received said estate into her possession and enjoyed it during her life, with the consent of the executors, that such consent operated in behalf of those who, by the will, take

after her death, so as to vest the title to the estate, after her death, in them, and leaves no ground, in law, for the granting of the application of said John C. Burch, now before them, and they should find against him. My response to this is, I decline to give it to you in charge; and on the contrary, charge you it is not the law of this case."

Exceptions were filed to the charge as given, and the refusal to charge.

VANDUZER; WELLBORN, for plaintiff in error.

T. R. R. Cobb, for defendant in error.

The Court not being unanimous, delivered their opinions seriatim.

By the Court.—LUMPKIN, J. delivering the opinion.

But two questions present themselves to our consideration upon this record, and I shall consider them in the order in which they were argued by Counsel.

[1.] The first is, whether the defendant in error, John C. Barch, by virtue of his appointment and qualification as executor of the last will and testament of Wm. Elizabeth Burch, became entitled to represent the estate of Mrs. S. Burch, deceased, of which Mrs. Elizabeth Burch was the sole surviving executrix, at the time of her death? The general principle was not denied by Counsel for plaintiff in error, but this case was sought to be made an exception, by reason of the fact, that if anything is to be done by the representative of William S. Burch's estate, it is solely to make the sale and distribution which, by the terms of the will itself, were not to be made until the death of Mrs. Burch; and consequently, could not, by any possibility, have been made by her as executrix. The argument is, that her executor cannot be subrogated to rights which she, herself, did not have. We have

not been able to arrive at this conclusion. The reason of the rule is thus given by Blackstone: "For the power of an executor is founded upon the special confidence and actual appointment of the deceased; and such executor is, therefore, allowed to transmit that power to another, in whom he has equal confidence." This reason applies with as much force to the case at bar as to any ordinary case. Moreover, this rule has been a settled rule of the Courts for more than five centuries, as appears by a Statute passed in 25 Ed. III. (A. D. 1352,) regulating the duties of such executors. Petersdorff, Abr. 301, note 1.) Such cases as the present must have frequently occurred, and yet, we find no such exception made, and nothing analogous thereto, from which to deduce it. (See Wentworth's Office of Ex'rs, 259; Godolphin's Orphan's legacy, Part II. Ch. T.; 4 Burn's Eccl. Law. 224: Wankford vs. Wankford, 1 Salkeld, 309: Williams on Ex'rs, Bk. III. Ch. T, p. 207.)

[2.] The other objection was more urgently pressed by the able Counsel for plaintiffs in error; and that is, that by the assent of the executors to the life interest of Mrs. Burch, under her husband's will, all the title passed out of the estate; and hence, that the will was fully executed, and there remains nothing for an executor to do. Waiving the point, whether this is a proper objection, if true, to the present application, as both parties have expressed a desire for the opinion of this Court upon this question, we shall proceed to examine the will, and see whether there does remain any portion of it un-The rule that the assent of an executor to the life executed. estate, enures to the benefit of a vested remainder-man, has been frequently recognized by this Court; and in Foster w. McGinnis, (4 Ga. 377,) it is very strongly intimated, that the mere fact of a sale being ordered for the purpose of a division, not only will not keep the remainder from vesting, but, in a proper case, the remainder-men, themselves, might make the sale and the division. But is this such a case? the remainders vested at the death of Wm. S. Burch? any one of the several beneficiaries took a contingent remain-

der, then the law, which will not allow an estate ever to be in abevance, must keep the title in the estate of Wm. S. Burch. until the contingency happens. We think it clear that those provisions in the will of William S. Burch, referring to the death of his wife's sisters, and also to the death of the heirs of William T. Cook, leaving no child or children, look to those contingencies as arising during the lifetime of his wife, and not during his own life. In fact, upon a careful review of this will, it is evident that the testator did not intend the title to any of his property to pass out of his estate during the lifetime of his wife, except in the event of her marriage. The care with which he distinguishes the use of the words "lend" and "give," shows that it was no unmeaning distinction with him. His testamentary idea clearly was, that his wife should have the usufruct of his estate, only the title remaining in his executors; and hence, he speaks of their resuming possession, of its being under their management, direction and control, after her second marriage, of their "lending" a portion to his sister Betty Cook, after his wife's death; still keeping the "management, direction and control," and finally providing for a sale and division. There can be no question that the testator intended this sale to be made by his executors; otherwise, how could they "lend" a portion of the proceeds of the sale to Betty Cook during her life, and keep the management, direction and control thereof? And if such was the intention of the testator, (upon which point I believe the Court are unanimous,) is the will fully executed until such sale is made?

But it is urged that the remainder-men, themselves, can make this sale. It is admitted by Counsel, that the remainder-men number at least one hundred; that they live in a half dozen different States of the Union-among others, Illinois and Texas; that they are of various ages, and some of them femes covert; that the interest of some of them would hardly pay their expenses from their homes to the site of this property. Only portion of them are parties to this caveat,

and some of them are possiby ignorant even of their having an interest, or of the death of the life-tenant. Is this a case for an Ordinary to refuse to appint a representative to a large estate, consisting chiefly of negroes, and to permit them to remain without a controlling hand; and the estate to be wasted upon the suggestion that all of these remainder-men, if they could possibly all be assembled, might make this sale and save the commissions of an executor? If titles can be made by them, all must join. The absence, minority, coverture, of any one, might be a cloud upon it. In the meanwhile, who has the right to control and manage the estate? If a trespass is committed, in whom does the right of action lay? Mark it, the proceeds of the sale, not the property, is given to these legatees-could they bring trover for one or more of the negroes? Could they sue in ejectment for the-These interrogatories, it seems to me, must show the impracticability and the impolicy of such a proceeding. is said that the proceeds of the sale being given to those legatees, they may elect to take the corpus, and thus dispense with a sale. That this may be done in some cases, and that a case may be made in which a Court of Equity would order the delivery of the property in specie, is undoubted. late case before this Court, (General Bledsoe's will,) we occupied and enforced this doctrine. But this must be done by a Court of Equity, upon a proper case made. How is the Ordinary informed that the legatees have made such election? How can he try the issue, whether this is a proper case for the enforcement of this rule? Suppose a portion of the legatees dissent, is the Ordinary to be governed by the majority, or shall he grant partial letters to administer and make sale of the portions belonging to the dissenting or non-assenting legatees? By whom is the division to be made between those legatees, electing to take in special, and those declining to These and many other difficulties suggest themselves immediately, as insurmountable obstacles to the action of the Ordinary, refusing letters testamentary on this ground. express no opinion as to the power of a Court of Equity to

meet them. Then, if at all, this election must be made, and it will be for that Court to decide whether the case is one which will authorize this relief.

STARNES, J. concurring.

I concur with the judgment delivered by Judge LUMPKIN in this case, and for the reasons which have been so ably assigned by him in his opinion.

BENNING, J. dissenting.

Ought the letters testamentary, on the estate of William S. Burch, to have been granted to John C. Burch?

They certainly ought not, if, at the time when they were granted, the legacies mentioned in the will had completely vested in the legatees. For in that case, the letters would give the grantee of them no power whatever; they could not give him power to touch any of the property bequeathed by the will, because the whole interest in that property would belong to others—the legatees. The most probable effect of granting them, would be to delude the person to whom they were granted, into the commission of a tort—the seizure of the property bequeathed in the will, under the idea that the letters would require of him such seizure.

At the time, then, when the letters were granted, had the legacies become completely vested in the legatees?

I say they had.

1. The remainders were never contingent.

This, I think, is, in all except one particular, completely settled by *McGinnis vs. Foster*, (4 Ga. R. 377.) The first head note of that case is as follows:

"Robert Foster made his will as follows: I give and bequeath unto my beloved wife, Celia Foster, all my estate, both real and personal, after my just debts and funeral expenses are paid, during her life or widowhood. In case my wife shall die or exchange her situation by marriage, it is my will, that a sale be made of all my property, both real and personal, and the proceeds be equally divided among my children. Celia Foster, a daughter of the testator, intermarried with Stephen W. McGinnis, after the death of her father, and died before her mother: Held, that the children of Robert Foster, who survived, took, at his death, a vested remainder in the estate." See, too, Jordan vs. Thornton and others, (7 Ga. 520.)

In this will, the word used by the testator in creating the life estates, is the word "lend." This is the particular to which the case of *McGinnis vs. Foster* does not extend.

But surely this word can have no other import in this will, than that of the word give. (Bryan vs. Duncan, 11 Ga. 67; Booth vs. Terrell, 16 Ga. 20.) How, indeed, can the word, when used in a will, ever have any other import? A loan is revocable. Is anything contained in a will—anything conveyed by a will, revocable after the testator's death, unless a special power of revocation is given by the will to somebody? Who is to revoke the loan when the lender is in the grave? The word cannot mean a loan.

It was argued that it appears to have been the testator's intention that there should be things done with the remainders by the executors, such as a sale and a division of the proceeds; but if we admit this to have been the intention, what does it amount to, if we have to admit, at the same time,

that these remainders were to vest, at the testator's death, in the remainder-men; i. e. were to belong, absolutely, to the remainder-men? In such a case, the intention is repugnant to the gift. The owner of property is not owner, if the property can be sold against his wishes.

And the expression of such an intention, must be considered a word of advice from the testator, to the objects of his bounty, not a word of law.

2. But if the remainders were ever contingent, it is most certain that they became vested on the termination of the life estate; i. e. on the death of Mrs. Burch. She had never married; they were, therefore, vested at the time when the letters testamentary were applied for; because that was after Mrs. Burch's death.

Whether, then, we consider the remainders as vested or as as contingent, the result is the same. That result is, that at the time when the letters were granted, the whole interest in all of the property conveyed by the will had become vested in legatees. If so, such letters could give the person to whom they were granted, no power at all over that property; and unless letters can confer on him to whom they are granted, some power over the testator's, they certainly ought not to be granted.

In addition to all this, I think that an executor would, in this case, do more harm than good, even in respect to the carrying out of the intention of the testator, as to a sale of the property and a division of the proceeds of sale. An executor's personal interest would be all against a speedy accomplishment of that object. As long as that object should remain unaccomplished, he would be handling the property and pocketing commissions. The attainment of these commissions, I have little doubt, myself, was the sole object of this application for letters. The estate is large; the claimants upon it many, and they persons widely separated from one another; so it was said in argument.

If there is to be a law suit among these claimants, the existence of an executor will not prevent it. If there is to be Upson vs. Arnold, ex'x, &c. et al.

none, it is not because an executor exists, that that is to be so.

All that could be said of him, it seems to me, would be, that he is in the way.

I will barely add, that Mrs. Burch, the life tenant, and one of the executors, had been executrix for some thirty years. Another of the executors qualified at the same time at which she did. She had been in the possession of the property for the whole time between her appointment and her death. It is to be presumed, therefore, that all of the testator's debts had been paid. If so, an administration was not needed for the payment of debts.

For these reasons, I dissent from the judgment of the Court rendered in this case.

- No. 42.—Stephen Upson, plaintiff in error, vs. Nancy C. Arnold, executrix, &c. et al. defendants in error.
- [1.] If, upon the dissolution of a partnership, general or limited, the retiring partner bona fide assigns all his interest in the stock and effects to the remaining partner, the same becomes separate property, and will be distributable accordingly, notwithstanding the subsequent insolvency of the remaining partner.

In Equity, in Oglethorpe Superior Court. Decision by Judge Thomas W. Thomas, October Term, 1855.

William S. Arnold, during his life, entered into partnership with Benj. A. Gresham in a mercantile enterprise. Subsequently, Gresham sold out to Arnold all of the assets of the firm, and Arnold assumed the payment of the debts of the firm. Arnold then entered into a partnership with Stephen Upson, as a limited partner—Upson putting in the sum Upson vs. Arnold, ex'x, &c. et al.

of \$5.000. Subsequently, Upson retired, selling out to Arnold, who assumed payment of the debts. Arnold died insolvent, many of the debts of the two preceding firms being still unpaid. On a bill to marshal assets, filed by the executrix of Arnold, the Court below decided, that by reason of the sales by Gresham and Upson, respectively, to Arnold, the firm assets became individual assets; and by reason of the assumption by Arnold of the firm debts, and his individual agreement to indemnify the retiring partners, the firm debts stood in Equity as individual debts; and hence, that all the creditors, of equal dignity, of both firms, and of Arnold individually, should be paid pro rata from all the assets. This decision is assigned as error by Stephen Upson.

CONE, for plaintiff in error.

T. R. R. COBB, for defendants.

By the Court.—LUMPKIN, J. delivering the opinion.

[1.] It is distinctly admitted by the able Counsel for the plaintiff in error, that in case of general partnerships, if the retiring partner bona fide assigns all his interest in the stock and effects to the remaining partner, that the same becomes thereby separate property, and will be distributable accordingly, notwithstanding the subsequent insolvency of the remaining partner; and that the sale made by Gresham to Arnold, comes within this principle; and such, undoubtedly, is the law. (Perkins' Edition of Collyer on Partnerships, 789.)

He denies, however, that the same rule applies to the transfer between Upson and Arnold, which was a case of limited partnership. The learned Counsel has cited no authority in support of such distinction. The Act of 1837 (Cobb's Digest, 585) recognizes none such. And the only reason assigned by the distinguished Counsel for incorporating this exception

upon the well established doctrine of partnerships, that in case of general partnerships, the retiring partner may still be sued for the firm debts, contracted previous to the dissolution, which cannot be done in the case of limited partnerships.

We will not say that this constitutes no ground why a different practice should not prevail in the two cases. No writer, however, upon this head of the law, has referred to any such distinction, not even when treating expressly and exclusively of the Law of Limited Partnerships. No such point has been adjudicated by any Court, English or American. And under such circumstances, we should not feel warranted in making such an innovation.

No. 43.—Pressley (a slave) plaintiff in error, vs. The State of Georgia; defendant in error.

- [1.] It is too late to object to a correction of the lists of Jurors, directed by the Court in the progress of selecting the Jury, if the objection be made after trial and verdict. If the prisoner were deprived of any right by the proceeding, the objection should, on this account, have been made to the Court, when a correction could have been applied and the ends of justice subserved.
- [2.] The Court may illustrate his instruction to the Jury, by a hypothesis which is unfavorable to the prisoner, if there be facts in the case to authorize such hypothesis; and is not under obligation to say anything of an opposite state of facts, if there be no evidence to this effect before the Jury.
- [3.] It is not error in the Court to decline to charge that the prisoner is not liable, if the death was produced by bad surgery, if there were no evidence of bad surgery in the case.

Murder, in Oglethorpe Superior Court. Tried before Judge Thomas W. Thomas, October Term, 1855.

A motion was made for a new trial in this case, on the following grounds:

1st. The first panel of Jurors being presented to the prisoner's Counsel, they were asked if they had any objection to the panel? And they replied none. The fifth Juror called was William H. Olive. Prisoner objected, because no such man appeared on his list, it being there written William H. Ogilvie. Olive was one of the original panel of 24 in attendance on the Court. The whole panel were not called before being put on the prisoner. The Court corrected the prisoner's list, and ordered Olive to be put upon the prisoner, and prisoner challenged him. This was the first ground for a new trial.

2d. Because the Court erred in charging the Jury upon implied malice, after reading to them the section of the Penal Code, in adding "To illustrate by this case: If you believe, from the evidence, that prisoner killed Boston (the dec'd) because Boston called him a d—d white-eyed son of a b—h, this is no considerable provocation, and the circumstances of the killing show an abandoned and malignant heart. The law implies malice, and the killing is murder."

3d. Because the Court erred, upon being requested by Counsel for prisoner to charge the Jury, that the defendant was not guilty of the homicide, if the death was not the natural result of the wound, if left to itself, but was the consequence of improper treatment, in saying to the Jury, that "such is the law, but the onus of proving the unskilful surgery, was upon the defendant, and the Court charges you that there is no evidence of bad surgery in this case."

4th. Because the bill of indictment was not read or submitted to the Jury, until they returned into Court and rendered their verdict. The Solicitor General, at the opening of the case, stated to the Jury the nature of the charge, and the proof he expected to make.

The Court below refused to grant a new trial, and this decision is assigned as error.

T. R. R. COBB, for plaintiff in error.

A. H. STEPHENS & L. STEPHENS, for defendant.

By the Court.—STARNES, J. delivering the opinion.

[1.] It does not appear, that any injury resulted to the prisoner from the proceeding, as it related to the Juror, Olive.

It is true, that the name of Ogilvie, appeared on the list of Jurors handed to the prisoner's Counsel, instead of that of Olive, (which was the right name, and not the name on the Clerk's list,) until the name of Olive was called in the progress of forming a Jury, when the variance was detected, and the list corrected by order of the Court. But if the prisoner had been deprived of any right by this proceeding, his Counsel should have made it known at the time, and then the Court might have given to the matter such a direction as would have protected the prisoner's rights, and still have subserved the ends of justice. No objection, however, on this ground was made. And it is too late now, after trial and verdict, to insist that the prisoner might have been deprived of his rights by this irregularity.

[2.] It is objected, that the charge was not accurate and fair, because the Court illustrated by the case, but put the illustration on a hypothesis which contemplated the prisoner as guilty of the crime of murder, and said nothing of a state of facts which might show that he was guilty of a less offence, or of no offence whatever. And to sustain this exception, is argued that the decedent did not receive the mortal blow when he and the prisoner were together on the floor, and when nothing had occurred more than abusive language, to provoke a mortal blow from the prisoner, but that this blow was in all probability given when the decedent was rushing out after the prisoner, who was leaving the room, and who, alarmed and agitated by the pursuit of the decedent, struck

back at the latter with his knife, and inflicted the wound which resulted in death.

If there had been evidence before the Jury to authorize this view of the case, it would have been unfair in the Court to have presented the hypothesis as he did, without bringing this view of the matter also to the attention of the Jury. But upon careful examination, we can find no testimony which justifies this conclusion. And therefore, we cannot say that the Court should have presented such a hypothesis to the Jury.

[3.] It was also insisted, that the Court erred in telling the Jury, that "there was no evidence of bad surgery" in the case. That the Counsel, in the use of the term "bad surgery," had not meant to speak of surgical treatment proper, but of unskilful and injudicious treatment; and that of this there was evidence.

Let the definition of the Counsel be received; and still, in our opinion, there was no evidence of such unskilful and improper treatment as should relieve this prisoner from responsibility, as the perpetrator of the decedent's death, and authorize the Court to say anything about Lad surgery.

The removal of the latter to his master's house, seems not to have been such injudicious treatment as produced his death, because this removal occurred soon after the wound was inflicted, the decedent lived some five days afterwards, and the physician testifies that the secondary hemorrhage, which was the immediate cause of the death, was a recent thing. No other evidence, which might be supposed to show injudicious treatment, was presented. The Court was therefore right in the observation made.

But even if this removal of the decedent, or any such act not plainly shown to have been unreasonable and wrong, had been the immediate cause of the death; still, would the prisoner be responsible for the act, unless, indeed, it were plainly shown that the wound was not, in its nature, mortal. And even unreasonable and injudicious treatment, which might be supposed to have been the immediate cause of the death, should not relieve the perpetrator of such an offence, unless

it were clearly shown that the wound was not necessarily mortal.

The testimony of the physician in this case is, that the wound was in the heart, and that not one in a hundred ever recover from wounds in the heart. He says, it is true, that secondary hemorrhage was the immediate cause of the death in this instance; that it was possible that secondary hemorrhage might have been avoided, if the patient had been kept quiet, and that from his having lived as long as he did, it would seem that upon a calculation of the doctrine of chances, the patient might have lived if he had been kept quiet.

From this it is argued, that death would not have resulted but for injudicious treatment.

This argument is not supported by the facts. There is nothing to show such injudicious treatment. As we have shown, the removal of the decedent to his master's house could not be so regarded. And it is not affirmatively shown, as we say it should be shown, in order to exonerate the prisoner from responsibility for such an act, that the wound was not mortal, but the death resulted from improper treatment. On the contrary, it was said by the physician, that it was barely possible, upon a calculation of chances, that death might not necessarily have resulted from the wound. And this physician states elsewhere, that he saw no other cause for the death but the wound. Again, he says that he had no doubt that the decedent died of the wounds inflicted.

Under these circumstances, we think it was not error in the Court to say that there was no evidence of bad surgery (even in the sense of bad treatment) in the case.

SUPREME COURT OF GEORGIA, SAVANNAH, JANUARY 14th, 1856.

At the opening of the Court, Hon. WM. LAW addressed the Court as follows:

May it please your Honors:

The melancholy duty has been assigned to me by my brethren of the bar, of announcing to this Court the death of the Hon. John McPherson Berrien, late the most distinguished member of that bar, and its brightest ornament; and of presenting to the Court the proceedings and resolutions of the bar of this city upon the occurrence of that lamented event, expressive of their appreciation of the character, and high respect for the memory of their departed friend and brother; as also their sense of the great loss the profession has sustained by his death.

Honored for more than forty years with the friendship of the deceased, commencing with my call to the bar, over which he then presided with an honor to himself so distinguished, and a benefit to the public so universally acknowledged, that even at that early period of his life he commanded, as a Judge, the fulness of public confidence, and laid the foundation of that enviable fame which survives his descent to the grave.

A friendship, sirs, thus early commenced, ripened into intimacy in the progress of life, was in no way and at no time more sensibly felt or gratefully appreciated, than in the uniform and almost paternal kindness which he extended to my early professional efforts and struggles. Few knew him better than I did—none honored and esteemed him more. I cannot refrain, on this occasion, from an expression of my sincere gratification at the testimonial furnished by my brethren of the bar, of their admiration for the character and distinguished merits of the deceased, and of the high respect

Tribute Respect to Memory Judge Berrien.

they entertain for his memory, nor from saying how much I appreciate their kindness in making me the honored instrument of bringing their proceedings to the notice of this Court.

But it is not limited to private friendship to sympathise with these proceedings. The death of such a man is a public calamity. His talents and usefulness had not been confined to his own State. The fame of his wisdom and rare eloquence, issuing from the Senatorial Hall of the nation, had spread over the country and placed him, in the estimation of his countrymen, among the great Statesmen and Legislators of the age. His death adds another name to that melancholy list of gigantic intellects and devoted patriots of our country, upon whom the icy hand of death has been laid in the past few years, and calls afresh for the homage of a nation's regret and sorrow.

It is true that Judge Berrien was spared by a beneficent Providence to an advanced period of life, far beyond that allotted to most men; but he still retained, in a remarkable degree, the energy of physical strength, and the vigor of undiminished intellect, combined with a spirited enjoyment of social intercourse. Nor yet had the fervor of his patriotism abated, for he still felt a lively interest in his country's welfare, upon all important political questions, and was to the last ready to lend the counsel of his experienced wisdom to what he conceived to be his country's good. Full of the learning of the law, he was still the eloquent advocate and the profound lawyer, and both the bench and the bar listened with pleasure and advantage to his instructive argument

But your Honors, who have so often heard him, and who knew him so well, I am sure, will fully appreciate the testimonials of his exalted worth and distinguished character, furnished by the proceedings of the Bar, which I have the honor now to present.

"At a meeting of the Bar, at the Court room in the City of Savannah, on the 2d day of January inst. the Hon. Wm.

Tribute Respect to Memory Judge Berrien.

B. Fleming was appointed Chairman, and Julian Hartridge, Esq. Solicitor General of the Eastern Circuit, Secretary.

"The Hon. Wm. Law, the Hon. Charles S. Henry, the Hon. Edward J. Harden, Hon. John E. Ward, and E. H. Bacon, Esq. were appointed a Committee to prepare resolutions expressive of the feelings of the meeting on the melancholy occasion of the recent death of the Hon. John McPherson Berrien, a member of the Bar.

"Whereupon, Wm. Law, in behalf of the Committee, presented the following preamble and resolutions, which were unanimously adopted by the meeting:

"The members of this Bar, desirous of giving public expression to their feelings, and the sense they entertain of the loss which the Bar has sustained by the death of its oldest and most distinguished member, who, for more than half a century has illustrated the virtues of the profession, adorned it by the exhibition of rare and eminent talents, and left an example of spotless purity and integrity of life; and also to manifest the affectionate esteem in which they hold the memory of their venerated departed brother, as a citizen eminent for his patriotism and public services, as a statesman distinguished for talents and integrity, and as a man endeared to their affections as well by his private as public virtues, by the social qualities of the heart as well as by the vigor of his intellect, do adopt the following resolutions:

- "1. Resolved, That the Members of the Bar here assembled, have heard with deep regret of the death of the Hon. John M. Berrien, and that we sincerely condole with the members of his family on the occasion of the loss which they, in common with the community, have sustained.
- "2. Resolved, As a testimony of respect for the memory of the deceased, the Bar will, in a body, attend his funeral.
 - "3. Resolved, As a further testimony of such respect, that his Honor, the Judge of the Superior Court of this county, be requested to have the staves of the Court draped in mourning, and that the Bar wear the usual badge of mourning for thirty days.

Tribute Respect to Memory Judge Berrien.

- "4. Resolved, That the proceedings of this meeting be laid before the Supreme Court of Georgia at its next meeting at this place, with a request that that body enter these proceedings on their minutes, and adjourn for one day, as a token of respect for the memory of the deceased, and that the same proceedings be laid before the Supreme Court of this county at its next session, with a similar request of entry on its minutes, and of adjournment for one week.
- "5. Resolved, That a committee of five be appointed by the chairman of the meeting to carry the foregoing resolution into effect, and also to select some suitable person to pronounce, at some proper time and place, a eulogy on the life and character of the deceased before the Bar of Georgia.
- "6. Resolved, That these proceedings be published in the several papers of this city, and that a copy of the same be furnished by the Secretary to the family of the deceased.
- "The Chair appointed as a committee under the 5th resclution, Hon. Wm. Law, Hon. C. S. Henry, Hon. John E. Ward, Hon. Edward J. Harden, and E. H. Bacon, Esq."

In accordance with these resolutions, I now move your Honors, that this Court do adjourn for one day.

Judge LUMPKIN in behalf of the Court responded as follows:

This Court receives the proceedings of the Bar. in regard to the late Hon. John McPherson Berrien, with profound emotion. We cordially unite with the Bar and the people of the whole State in the expression of deep regret for his death, in admiration of his talents—his patriotism and private virtues.

This is not the occasion, nor is it for me to consider and discuss at length the character and merits of the deceased. The performance of that duty, with which the Bar of this place has appropriately charged itself, must be deferred to another opportunity; and has been, or will be, committed to abler hands. And this is right. This community, who knew his manner of life from his youth up, saw him face to face for fifty years and more, in the able and faithful performance

Tribute Respect to Memory Judge Berrien.

of his various duties; and it is for them to appreciate, fully, all his worth, and to dwell with melancholy affection upon his transcendent excellencies.

But the whole State has sustained an irreparable loss. Who, in Georgia, had attained to his full stature? As a lawyer and a citizen, who will dispute with the premiership? What completeness and harmony of organization of the mental, moral and physical nature! He aimed at noble ends, and pursued them by none other than honorable means. Whatever he attempted he did well. Nothing half done ever came from his hands; for as uncommon as were his great abilities, his industry was still more extraordinary.

Who can estimate the impulse and advance which he gave to the cause of legal learning in this city and circuit, and throughout the land? Reference has been made to his service in the councils of the nation. Permit me to say, upon competent authority, that his constitutional arguments in the Senate of the United States, were exhaustive of the subjects which he discussed; and that, on such occasions, no member was deferred to more in that body. His logic was the clearness of the perfect day, approaching the certainty of mathematical demonstration.

Judge Berrien was a striking example of the love of the law, supposed by so many not to be altogether lovely; and his attachment, instead of wavering, seemed to wax warmer and warmer under the pressure of super-added years. Hence his brilliant and triumphant success. He had many cotemporaries at the Supreme Court Bar of the Union. Johnson, of Maryland; Badger, of North Carolina; Crittenden, of Kentucky, and such like; but yet we may say, that while thinking of these gifted men, we feel new and increased pride in the consummate lawyer, whom we have lost. Had he been placed upon the bench of that Court, for the headship of which he was so pre-eminently qualified, his judicial fame would have been measured by that of Mansfield and Elden, and Stowell

Tribute Respect to Memory Judge Berrien.

of England; and Marshall and Kent, and Story in this country.

But our father and friend is gone. He has taken his place high in the same firmament whence beam the milder glories of the beloved and lamented Charlton. His race is run. His course is finished. For him, earth has no longer any future. He is beyond change—beyond chance. His home is Heaven.

Is it not well with him? He died happy and in the bosom of his family, full of years and full of honors. His bright sun has set. Far above us, he dwells in a world where there is no night!

The last time I saw Judge Berrien was under my own roof—the sunshine of the festive circle, and seeming "to breathe a second spring." But we shall see him no more in the flesh. How difficult to realize this sad truth! Seek him at the domestic hearth, the office, the Court-room, the Cabinet Council, the Senate Chamber, the Sanctuary, and the solemn response from each is, "he is not here, he is risen."

We shall never again witness the illumination of that countenance, which when lighted in the glow of his mind, was almost supernatural. We shall no more listen to the silvery eloquence of those lips, "upon which the bees of Hybla might have rested."

But we forbear. The theme is exhaustless. That deep feeling of sorrow should be entertained, when one thus virtuous and accomplished is stricken down by death, is natural; and that an expression of these feelings and a just tribute of regard for the deceased, should be preserved on the records of this Court, of which he was so distinguished an ornament, is most meet and proper. We therefore order the resolutions to be entered of record; and, that the Court do adjourn for the day.

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF THE STATE OF GEORGIA,

AT SAVANNAH,

JANUARY TERM, 1856.

Present—JOSEPH H. LUMPKIN, HENRY L. BENNING, CHAS. J. McDONALD.

- No. 44.—THE CENTRAL RAIL ROAD & BANKING COMPANY, plaintiff in error, vs. HINES, PERKINS & Co. defendants in error.
- [1.] A party on the record who, at the trial, has no interest in the event of the suit, may be examined as a witness.
- [2.] It is not error to refuse instructions to the Jury asked for, if there is nothing in the evidence to warrant them.

Case, in Chatham Superior Court. Tried before Judge FLEMING, May Term, 1855.

This action was brought by Hines, Perkins & Co. vs. The Central Rail Road & Banking Company, as common carriers,

for an amount of lumber burned while lying on the road side awaiting transportation. On the trial, Malcolm C. Perkins, one of the plaintiffs, was offered as a witness; and at the same time, it was admitted that he ceased to be interested in the case, except as to costs. To relieve that disqualification, plaintiffs deposited with the Clerk a sum of money more than sufficient to cover the costs. The Court admitted the witness to testify, and this is the first error assigned.

It appeared from the evidence, that the lumber was not delivered at a station or depot, but was placed at the 22 mile post. The R. R. Co. had previously received lumber at the same point, and there was some evidence to show that the conductor and superintendent of freight trains had agreed to transport the lumber from that point on a specified day, shortly after the fire, which arrangement had been acquiesced in by the plaintiffs.

The Court charged the Jury-

1st. That common carriers, in Georgia, are insurers of all goods intrusted to their care, and are responsible for every injury sustained by them, except injuries resulting from the act of God or the public enemy.

2d. That this Common Law liability could not be varied or limited by notice or special acceptance. That the law, making common carriers insurers, and putting it out of their power to vary or limit their liability, seemed harsh, but it was founded on considerations of public policy. That, at any fate, the Supreme Court of Georgia, in the case of Fish vs. Chapman & Rose, had decided that such was the Common Law in 1776, and that this Common Law was made obligatory upon the Supreme Court by our Adopting Statute. If obligatory upon the Supreme Court, of course obligatory upon this In this view of the subject, the effect of our Adopting Statute is equivalent to an enactment that common carriers, in Georgia, shall be liable as insurers, and that this liability shall not be varied or limited by notice or special That this was an answer to all the cases cited, showing that this doctrine had since been modified, for there

was no evidence of any similar Statute in the States, where the modification had been recognized.

3d. That it was not necessary to prove carelessness or negligence in the common carrier. This was only necessary, where the doctrine of notice and special acceptance was held to be law, and then admitted for the purpose of making the common carrier liable, notwithstanding his notice or special acceptance.

4th. That if these principles be true, the case must turn upon the question whether this lumber had ever been delivered to the defendant. On this subject the Court charged, that it was not necessary, to constitute a delivery, that the delivery should be at a station or depot. The Court would not, however, be understood as charging that individuals could deposit goods along the road anywhere and everywhere, and that such deposit would be a delivery. I mean only to say that goods may be delivered at any point agreed upon by the parties, although the point may not be a station or depot. Whether the 22 mile post was such a point, is a question of fact for the Jury. If the Jury find the fact of delivery, the defendants are liable; if there was no delivery, the defendants are not liable.

Counsel for defendants then requested the Judge to charge the Jury-

1st. That defendant might limit its Common Law liability by notice brought home to the plaintiffs.

2d. That a special contract could be entered into between plaintiffs and defendant, and that such contract could only be nullified by negligence or fraud on the part of the defendant.

3d. That a deposit of lumber on the side of a rail road, at a point where there was no station and no agent of said rail road, was not, in law, a good delivery.

The Judge refused so to charge.

The errors assigned are-

1st. That the Court erred in admitting the testimony of Malcolm C. Perkins, a party to the record, liable to distrib-

utive costs; and therefore, an interested and incompetent witness.

- 2d. That the Court erred in instructing the Jury, that the Common Law liability of defendant could not be varied or limited by notice or special acceptance.
- 3d. That the Court erred in refusing to instruct the Jury that defendant might limit its Common Law liability, by notice brought home to the plaintiffs.

4th. That the Court erred in refusing to instruct the Jury, that a special contract could be entered into between plaintiffs and defendant, and that such contract could only be nullified by negligence or fraud on the part of the defendant.

5th. That the Court erred in refusing to instruct the Jury that a deposit of lumber on the side of a rail road, at a point where there was no station and no agent of said rail road, was not, in law, a good delivery.

GORDON, for plaintiff in error.

Norwood & Wilson, for defendants in error.

The Court not being unanimous, delivered their opinions seriatim.

By the Court.-McDonald, J. delivering the opinion.

It becomes my singular duty to deliver the opinion of the Court, while I dissent, in part, from its judgment. This I shall proceed to do, and I shall then assign the reasons which have induced me to differ from my brethren, on the point of disagreement.

The errors assigned in the record are-

- 1. That Malcolm C. Perkins being a party to the record, and therefore an interested and incompetent witness, ought not to have been allowed to testify.
 - 2. That the Court instructed the Jury that the Common

Law liability of defendant, as a common carrier, could not be varied or limited by notice or special acceptance.

- 3. That the Court refused to instruct the Jury that defendant might limit its Common Law liability by notice brought home to the plaintiffs.
- 4. That the Court refused to instruct the Jury that a special contract could be entered into between plaintiffs and defendant, and that such contract could only be nullified by fraud or negligence on the part of the defendant.
- 5. That the Court refused to instruct the Jury, that the deposit of lumber on the side of a rail road, at a point where there was no station and no agent of said rail road, was not, in point of law, a good delivery.
- 1. It is the opinion of a majority of the Court, and therefore, the ruling of this Court, that the Circuit Judge committed no error in allowing Malcolm C. Perkins to be sworn as a witness on the trial of this cause.

It is true, that at the time of the institution of the suit, he was a party to the record and a party in interest; but before the trial, he had sold and assigned his interest in the firm of Hines, Perkins & Co. and was indemnified, so far as the costs were concerned, so that, when offered as a witness, he had no interest in the suit, though he was still a party to it. Court being of opinion that the only reason for the exclusion of a party to the record from being a witness, is the interest he has in the cause, believe that when that objection is removed, he may be sworn as other witnesses; and if any objection remain, it goes to his credit, and the Jury will judge Elementary writers on evidence, of great reputation, put the exclusion of a party to the suit on the record, as a witness in his own favor against the adverse party, on the immediate and direct interest which he has in the event of the suit. (1 Phillipps' Ev. 69; Norris' Peake, 219; 1 Starkie, on Ev. 105.)

The identical point now under consideration, was expressly adjudicated in the case of Willings & Francis et al. vs. Consequa, (1 Peter's C. Ct. Rep. 307,) and the party to the suit

divested of all interest, was adjudged to be a competent witness. In Pennsylvania, similar decisions have been made, and the majority of the Court, here, believing that the interest of the party, in the event of the suit, lies at the foundation of the rule which renders incompetent the party to the record, as a witness, hold and adjudge that when that interest is removed, the disqualification ceases, and he may be examined as a witness.

2. We now come to the consideration of the charge of the Court. Whether the presiding Judge was right in charging the Jury as he did, and in refusing to instruct the Jury as requested by defendant's Counsel, depends on the evidence submitted in the cause. The proceedings in the Court below exhibit no proof of any notice given by defendant, brought home to the plaintiffs; nor any special acceptance of the lumber by defendant, by which its Common Law liability, as a common carrier, could be varied or limited; nor do they show that any special contract for such a purpose was set up or proved.

The whole of the proof, so far as it appears in the record, was directed to the point, whether the lumber had been delivered to and received by the defendant, before it was burnt; and the Judge before whom the cause was tried, in his charge to the Jury, put the liability of the defendant on that issue. To have given the instructions to the Jury contained in the first and second requests of defendant's Counsel, there having been nothing in the evidence to warrant them, would have been error. It was not error to refuse them.

In regard to the third instruction asked, it may be remarked, that as an abstract legal proposition, it is correct as stated; but it is not true that the defendant could not, by its agreement, make such a delivery a good one; and that was the question in this case. The evidence was mainly directed to the proof of this issue. On the one hand, it was proven that defendant had hauled lumber for the plaintiffs from the same point before; that the lumber had been lying by the road for five or six weeks before the burning; that the super-

intendent of the freight train was applied to, almost every day during the month of March, to haul the lumber; that the conductor of one of the freight trains had, about the middle of March, hauled one load and had promised to haul another the next day, but the train was taken away from him and he did not haul it; that a train intended for plaintiffs, was once taken and sent to Macon for cotton. The defendant never objected to the place to which the lumber was carried. things might well have been considered by the Jury, in determining whether the lumber had been delivered to and received by the defendant. On the other hand, it was equally proper for them to have considered, as repelling such conclusion, the evidence, that the platform on which the lumber was piled, was the plaintiff's own platform; that the plaintiffs sometimes chartered a train and carried their own lumber; that there was neither a station nor an agent of the defendant at the point where the lumber was deposited; that it was the custom of the road to haul lumber at the road, a convenience which was known to plaintiffs, who always acted under it: that the plaintiffs were hauling lumber down to the day preceding the night of the fire; that on the Saturday before the fire, the superintendent of freight trains offered to carry one load, but one of the plaintiffs said a part could be of no use to him: he would like to have it hauled together; and it was arranged that it should all be carried down on the following Saturday. Before that time arrived, the lumber was burnt.

Hence, it will be perceived, that it was by the plaintiffs insisted, that the lumber had been received by the defendant before the burning; while, on the other hand, it was contended, that although deposited there, it had never been delivered to and received by defendant. The Jury, alone, could determine the question, and the charge of the Court seems to have been sufficiently explicit on this point, when he declared that he would not be understood as charging that individuals could deposit goods along the road, anywhere and everywhere, and that such deposit would be a good delivery.

There was no evidence to justify the instructions to the Jury, asked for by the plaintiff's Counsel, in their first and second requests; nor was there any for the charge of the Court, as given, on the points to which said requests were directed. But no error is assigned on that account.

It may not be amiss to say here, however, that the point in the case of Fish vs. Chapman & Ross, was, whether the special contract constituted the plaintiff in error a common carrier, and not whether it restricted his liability as a common carrier. The Court held that he was liable on his contract, under the facts in proof, and that as his contract imposed on him more onerous terms than the law does on common carriers, on their ordinary contracts, the charge of the Court, that he was liable as a common carrier, could have had no improper influence with the Jury against him. The doctrine of notice and special acceptance, was learnedly and ably discussed; and although it was not necessarily involved in the question before the Court, we approve of it generally.

A party to a contract cannot, of his own will, change the law of that contract, nor can a man, by giving notice, abrogate the law or change a rule of law, which attaches to the business in which he is engaged, a peculiar liability. are not to be understood to say, that he may not make a contract, when he makes it on equal terms with those with whom he deals, to mitigate the hardships of a legal rule, which exposes him to apparently unreasonable liabilities, wherethat contract is not forbidden by any principle of the Statute or The argument and consideration of this case. Common Law. have suggested some points of vast interest to the community and to rail road companies. Do they stand on the precise footing of other common carriers in all respects? they not bound, in consequence of the extraordinary privileges they enjoy, to provide ample means for the transportation of all produce and commodities that may be offered at. either terminus, or along the line of the road, and to receive and carry the same within a reasonable time? Whether, if they have the power of restricting their liability by a special

agreement, such agreement can be demanded of a freighter who brings his produce or merchandize, at great expense and inconvenience, to the road, without any knowledge that such requirement will be made? Whether, if unreasonable terms are imposed, under any circumstances, they will be sustained? None of these things can now be decided; and it is sufficient to say, in this case, that the judgment of the Court below is affirmed.

I proceed, now, to assign my reasons for dissenting from that part of the decision of the Court which adjudges that Malcolm C. Perkins was a competent witness on the trial of the cause. Though his interest had been removed, he was a party to the record, and a party to the issue to be tried. it be a rule of law, that a party to the suit is an incompetent witness to testify in the cause, and it stands alone as a rule of law, independent of a reason, it cannot be annulled by attaching thereto a conjectural reason, and holding that that reason, under particular circumstances, does not exist. Commentators on the Law of Evidence, not satisfied with stating the rule of law, have undertaken to give a reason for it; and as parties to the suit are always to be presumed to have a direct interest in the event of it, they have assigned that convenient reason as the only reason for it. But the reason, as stated, is by no means as ancient as the rule itself, and constitutes no part of it. I do not mean to say, that it was not among the motives that led to the establishment of the rule. Whether the law, in regard to the competency of witnesses, has its foundation in "a Statute worn out by time," or derives its authoritative force from the immemorial usage of Courts in their administration of justice, it is the law, and the law independent of a reason.

But learned and distinguished writers on the laws of England, and on the particular law of evidence, have conceived that there might be other reasons for rendering the party to the suit incompetent, besides his interest in the event of the suit. Sir William Blackstone says, that "to avoid all temptations to perjury, the law of England lays it down as an in-

variable rule, that 'nemo testis esse debet in propria causa." In 1 Gilbert on Evidence, the general rule is stated to be, "that no man can be a witness for himself." He speaks of the rule as universal in civil matters. Mr. Greenleaf states the general rule of the Common Law to be, that a party to the record in a civil suit, cannot be a witness for himself or a co-suiter in the same cause. "This rule of the Common Law," he remarks, "is not founded solely, in the consideration of interest, but partly also, in the general expediency of avoiding the multiplication of temptations to perjury."

That this rule of the Common Law, is not founded exclusively on the interest that the party has in the event of the suit, if it be needful to go into that inquiry, is deducible from the fact, that according to the rule of the Common Law, a party to the suit cannot be compelled, against his will, to give evidence against his interest for his adversary; while a witness not a party to the suit, but interested in the event of the suit, is not competent, and cannot be allowed to give evidence at the instance of the party in favor of whom his interest inclines, but the opposite party, against whom his interest is, may compel him to testify. If it be interest alone that disqualifies, why not compel the party to the suit to testify against his interest as well as the witness who is not a party? The Courts have never felt authorized, proceeding upon the reason of the thing, to change this rule. been changed, however, but it required the power of the Legislature to do it. It is to be hoped that this innovation will work well in practice. Less difficulty is certainly likely to result from it, than will probably ensue from the establishment of a rule which will place it in the power of a party to the issue, to make merchandize of his oath, by selling and assigning his interest in his own suit, and then give evidence to sustain it. It is a temptation; and although honest and honorable men will not be seduced by it, it is to be feared that such men may become the victims of unscrupulous adversaries. We should take human nature as it is, liable to the control of selfish influences, and save the administration of justice, as.

far as possible, from the effects of its imperfections. An old and eminent writer, who believed that the rule in this case was one of universal exclusion, remarks of it, that "it preserves infirmity from a snare and integrity from suspicion, and keeps the current of evidence, thus far at least, clear and uninfected."

Modern cases which go to the extent of admitting the party to the suit as a competent witness, when his interest is removed, are predicated on the supposed exclusive reason for the rule, and not on the rule itself. Such is the case of Willings & Francis et al. vs. Consequa, in 1 Peters' Circuit Reports. In no old reported case have I been able to find a a departure from the rule, on the ground that the interest of the party to the suit had been removed, and that he was, therefore, a competent witness.

The case last referred to, that of Willings & Francis et al. vs. Consequa, has been strongly disapproved by the Supreme Court of the United States. "They think it is not sustained by principle or authority." (12 Peters' Rep. 149.) The same Court determined, in the case of John F. Stein vs. William Bouman et al. that the objection to the competency of a party, does not arise so much from the small pecuniary liability to the payment of costs as to that strong bias which every party to a suit must naturally feel. (13 Pet. R. 219.) The same doctrine is reiterated in the case of Bridges et al. ve. Armour et al. (5 Howard's U.S. Sup. Ct. R. 94.) In the case of Norton vs. Woods & Woods, (5 Paige's R. 251,) it was said that a partner who had assigned all his interest in the demands and effects of the firm to his co-partner, who brings an action at Law in the name of both, for a co-partnership demand, could not be examined as a witness by the defendant, on the ground that he was a party to the record. Cases are collected and referred to in Cowen & Hill's Notes on Phillips' Ev. 134 and 1548, to the same effect, as well as others which seem to support the opposite principle.

In the case of The King vs. The Inhabitants of Woburn, Lord Ellenborough held that the person who was offered as

a witness on the trial of that cause, was inferentially a party on the record; and that it was a long established rule of evidence, that a party to the suit cannot be called on against his consent, by the opposite party, to give evidence. (10 East. R. 395.)

It will be found, on an examination, that the cases cited to sustain the principle, that a party to the suit who has no interest in the event, may be a witness, fall short of it. In the case in 17 *Pickering*, the witness was not a party on the record, but was rejected because of his interest, he having conveyed, with warranty, real estate attached on plaintiff's writ. The Court rejected him, although he testified that he considered himself fully indemnified against his covenants, and felt no interest in the event of the suit,

In the case in 2 Espinasse, the defendant who was offered as a witness, had let judgment go by default, and was no party to the issue to be tried.

The case in 16 Pickering, was decided partly on a Statute of Massachusetts. The defendant sworn had been defaulted.

In the case in 18 Johnson, it was not the party to the suit who was offered as a witness, but the Attorney who was liable for the costs, and he was objected to on that ground. Plaintiff gave to defendant a bond of indemnity for the costs, and defendant acknowledged the sufficiency of the obligors.

The case in 6 Barbour's Rep. places the rule which excludes the party to the suit from being a witness, on the true ground, viz: that it is founded partly on the interest which he has in the event of the suit, and partly on public policy. It also presents a pretty full examination of the cases on the subject, and very properly draws a distinction between parties on the record, and parties to the issue to be tried. One of the strongest, and perhaps the strongest, English case cited by Counsel for defendant in error, is the case of Worfall vs. Jones, Baker & Jones, (7 Bing. 395,) and in that the defendant, who was offered as a witness, had suffered judgment by default, and was no party to the issue to be tried.

. The ruling of the Court in that case was, that "when the

party to the suit had suffered judgment by default, waives the objection and consents to be examined, and is called against his own interest, there is no ground, either on principle or authority, for rejecting him."

This Court has held, that where one of two joint defendants does not appeal from a verdict rendered against both, but an appeal is entered by the other, the party not appealing is a competent witness on the appeal trial. In such case, the whole record goes up; and he is, therefore, a party on the record, but he is no party to the issue to be tried.

The rule as contended for, is not an equal one. Plaintiffs may always remove the disqualification, and defendants rarely ever.

I think, therefore, upon a full view of the case, that the judgment of the Court below, admitting Malcolm C. Perkins to be examined as a witness, ought to be reversed.

Benning, J.

In all the points of this case except one, the members of the Court are unanimous.

That one is the decision of the Court below, to the effect that Perkins, one of the plaintiffs, having assigned his interest in the partnership to his co-partners, became a competent witness for the plaintiffs as soon as they had deposited with the Court one hundred dollars, to be applied to paying the costs, if the costs should fall on the plaintiffs.

That decision, I think, was right.

In Worrall vs. Jones (7 Bing. 395) Tindal C. J. delivering the opinion of the Court says: "No case has been cited, nor can any be found, in which a witness has been refused, upon the objection in the abstract, that he was a party to the

suit: on the contrary, many have been brought forward, in which parties to the suit, who have suffered judgment by default, have been admitted as witnesses against their own interest; and the only inquiry seems to have been, in a majority of the cases, whether the party called was interested in the event or not; and the admission or rejection of the witness has depended on the result of this inquiry."

This statement, in my opinion, is strictly true. No case of the kind referred to in the statement has been cited before this Court since I have been a member of the Court, although two opportunities have existed for the citation of such a case—one on the hearing of this case, and one on the hearing of the case of Kilpatrick vs. Wooten, a case returned to Decatur Term, 1855. In these cases, the discussions too, were by different sets of Counsel, and were both able.

The decision of the said case in *Bingham's Reports* was, that a defendant in debt, who was the principal in the contract, and who had suffered a judgment by default, was a competent witness for the plaintiff in an issue, raised between the plaintiff and another defendant, who was a surety for that defendant, although this defendant, the surety, objected to his being sworn.

Here the person sworn was still a party to the case. That a judgment by default had been rendered against him, did not make him cease to be a party to the case.

In cases of tort it is every day's practice to make decisions similar to this.

Lord Chief Baron Gilbert, in his work on Evidence, says: "Concerning persons interested in the matter in question, the general rule is, that no man can be a witness for himself."

After discussing this rule he says: "From this rule concerning interest a corollary may be deduced."

"That the plaintiff or defendant cannot be a witness in his own cause; for these are the persons that have a most immediate interest."

That a party cannot be sworn in his own cause is, then, according to the Chief Baron, not a rule in itself, but is a cor-

ollary from a rule—the rule that a person cannot be a witness to support his own interest.

Of course, the Chief Baron would have to say, that in a case in which the rule does not exist, the corollary does not exist.

Not only is there no decision of which I am aware, to the effect that a person who is a party to a case, is, merely becausehe is a party, although he has no interest in the case, incompetent to be sworn as a witness in it, but there is, besides the cases of default to which I have referred, at least one decision to the precise effect, that such a person is competent to be sworn as a witness in such a case. It is the decision of the Circuit Court of the U.S. (Washington, J.) in Willings vs. Consequa, (1 Pet. C. C. 301, cited in notes to Phill. Ev. 187,) a case very much like the one now before this Court. Judge says, "The general rule of law certainly is, that a party to a suit cannot be a competent witness. But it is equally so, that the interest which that party has in the event of the suit, both as to costs and the subject in dispute, lies at the foundation of the rule, and when that interest is removed, the objection ceases to exist. In this case, the assignment has terminated the interest of H. in the subject for which the suit is brought—as to the costs they are paid by the assignees, now the only real plaintiffs on record."

This decision has never, I believe, been over-ruled. It is true, that Judges of the Supreme Court of the U. S. have, in the course of delivering opinions in cases not analogous to this—in cases in which the person objected to as a witness, though a party, was yet a party, not freed from interest in the suit, at least not from interest in the costs, allowed themselves to say that this decision was not law. (See 5 How. 91.) Judges of other Courts in some of the States, have indulged in remarks of the same sort. But dicta that are aside from the case in which they are made, are not worth much—not as much as a decision, though that be one which they condemn.

This decision is in accordance with what I understand to

be the rule of the Common Law, viz: that it is interest which is the thing that disqualifies, and not the being or not being a party to the suit.

The whole argument, ab inconvenienti, is in favor of this being the rule. In swearing a person as a witness, the object is to obtain the truth. Why is not this object as well accomplished by the swearing of one disinterested person as by the swearing of another disinterested person? What difference can the fact make that one of them may be named in the case as a party and the other not? But unless there is a difference ought there to be a distinction? Ought that source of opprobrium to the Courts, if not to the law itself, at this day, to receive any additional supplies?

I think the decision of the Court below, admitting the witness, ought to be affirmed.

LUMPKIN, J.

Was Malcolm C. Perkins a competent witness to testify in behalf of the plaintiffs?

At the commencement of the suit, he was one of the firm of Hines, Perkins & Co. and is still a party to the record, although he has sold out his entire interest in said firm. Under a rule of Court obtained for that purpose, an amount admitted to be sufficient to pay all costs which might accrue in the case, was deposited in the Clerk's office; so that the question is presented, is one who has no interest, whatever, in the event of the suit, disqualified from testifying, solely because he is a party to the record?

This is an open question, upon which different Courts, both English and American, have had their different views. What I mean to say is, that while it is laid down in all the books

that a party to a suit at Common Law cannot be a witness, and that it may be truly asserted that this rule is univeral; yet, I take it upon myself to affirm, after the most thorough examination and upon the highest judicial authority, that no case can be cited, nor can any be found, in which a witness has been refused upon the objection, in the abstract, that he was a party to the suit. On the contrary, express adjudications are to be found in which parties to the record have been admitted as witnesses. And the only inquiry made in the vast majority of cases, especially those which are modern is, whether the person tendered is interested in the event of the suit?

How stands the point, then, upon principle? It will be found stated by the elementary writers, as well as in the reported cases, that the rule of exclusion is not founded merely upon interest, but is based, in part at least, upon considerations of policy, to prevent perjury. And yet, to show the shallowness of this reason, either party may be put to his oath and made a witness in Equity, where he is quite as likely to commit perjury as in a Court of Law.

Parties and persons interested, are everywhere held competent to prove the loss of a written instrument, or that it is in the power of the other party and notice to him to produce it on the trial, or other circumstances necessary to authorize the introduction of secondary evidence of its contents. Also, to prove the death of a subscribing witness or other facts, in order to the admission of his handwriting; and all other preliminary facts in the case. Are such persons less exposed to perjury than one who will not be gainer or loser in the event of the suit, and has no possible interest in it, simply because his name is to the record?

In view, therefore, of our own liberal legislation, which allows a party at Common Law to be examined even against his interest; and of the tendency of the age to let all objections to testimony to go to its credit, rather than to its competency, I am of the opinion, that in every case where a party in a remote degree represents his own interest in a suit, the rule of

exclusion ought to be under the law, as it is, strictly adhered to. But if the party to the record be found without any possible interest to gain or jeopardize, by the event of the suit, the rule ought to be relaxed and the party sworn.

- No. 45.—Louis E. B. DeLorme, adm'r, &c. plaintiff in error, vs. Theodore P. Pease, defendant in error.
- [1.] A bona fide purchaser of land under a mortgage fi. fa. will be protected in his title, notwithstanding any irregularity in the proceeding of the foreclosure; especially after the same has been acquiesced in for nearly thirty years.
- [2.] G B M applied for letters of administration upon the estate of H H and a citation was published according to law; a caveat being filed by one of the creditors against the application, by the consent of G B M, letters were granted by the Court to E S R in behalf of the creditors: Held, that the appointment was good, and that it was not necessary that another citation should issue.
- [3.] The Act of 1841, to repeal the charter of the Bank of Darien and to wind up its affairs, directed that the Bank of Darien should execute a deed of conveyance of its real estate to the Central Bank of Georgia: Held, that if the Statute itself did not operate a transfer of the title from one corporation to the other, that possession by the Central Bank of the real estate of the Darien Bank, would be sufficient so to connect the two as to support the Statute of Limitations. The permission to re-call a witness, is, at Common Law, always in the discretion of the Court—the Judge consulting his own convenience, in the despatch of business as well as the benefit of the parties: Held, therefore, that the LXXIVth Common Law Rule of practice in this State, restricting the exercise of this discretion, transcends the power of the Superior Courts, the same being limited to new matter and such as is not provided for at Common Law or by our own legislation.

Ejectment, in McIntosh Superior Court. Tried before
Judge Fleming, November Term, 1855.

This action was brought by Louis E. B. DeLorme, as the

administrator, &c. of Henry Harford, dec'd, vs. Achilles A. DeLorme and Theodore P. Pease, for a parcel of land near Darien. Both parties claimed under Henry Harford, who died in possession of the premises. In his lifetime, he had mortgaged these premises to the Bank of Darien. After his death, in May, 1827, a rule nisi for foreclosure of this mortgage was granted; on 21st April, 1828, a rule absolute for foreclosure was granted.

The defendant then offered in evidence the docket book of the Court of Ordinary of McIntosh County, in which appeared the following entries:

STATE OF GEORGIA, McIntosh County:

DARIEN, 13th November, 1827.

George B. McKinstry applies for letters of administration on the estate and effects of Henry Harford, late of said county, deceased; I have therefore issued citation to be published in the Darien Gazette, according to law.

GEORGE T. ROGERS, CL'K C'T ORD'Y.

Caveat of the Bank of Darien being allowed, and by consent of Mr. McKinstry, letters ordered to be granted to Eben. S. Rees, in behalf of the creditors. January Term, 1828. Letters granted. G. T. ROGERS, c. c. o.

The defendant then introduced the minute book of the said Court, in which is found the following entry:

GEORGIA, McIntosh County:

DARIEN, 14th January, 1828.

At a regular meeting of the Court of Ordinary, present their honors

JACOB WOOD,

ALLEN B. POWELL, WM. A. DUNHAM.

On application of G. B. McKinstry for letters of administration on the estate of Henry Harford, deceased, caveat by E. R. Harford and A. Kimberly, President of the Bank of Darien, against G. B. McKinstry, on the estate of Henry

Harford, on calling up of this case, E. R. Harford not appearing or supporting his claim as next of kin to the intestate, and Mr. McKinstry yielding his right to the administration to the Bank of Darien, who have named E. S. Rees as their attorney,

It is Ordered, That letters of administration do issue on the estate of H. Harford, dec'd, to E. S. Rees, in behalf of the creditors, and that he give security in the sum of \$15,000, and Tho's Spalding and James Troup be his security.

It is Ordered, That the following persons be appointed appraisers on the estate of Henry Harford: Messrs. G. B. Mc-Kinstry, J. Sawyer, C. G. Grandison, Tho's King and Wm. McMaster, or any three of them.

The Court then adjourned until the first Monday in February next.

ALLEN B. POWELL, J. I. C.

W. A. DUNHAM, J. I. C. JACOB WOOD, J. I. C.

Attest: George T. Rogers, C. C. O.

The defendant then offered in evidence the original bond of E. S. Rees, which was executed on the same day.

In July, 1828, this lot, with others, was sold by the Sheriff and purchased by the Bank of Darien, who rented it out and paid taxes therefor, and afterwards, in January, 1847, the Central Bank (representing the Bank of Darien) sold this land to the defendant, Pease.

A. LEFILS, a witness, stated that a suit in Equity was instituted several years ago, in 1836, by the heirs of Harford, against Bank of Darien, about same property, which after being on the docket for some time, was dismissed, but that the record of the suit is lost; that files of the Darien Gazette, in which the county officers then published, could not be had, the paper having been long ago discontinued.

A letter was then handed to him, and he was asked if he could swear to the handwriting of E. R. Harford; he replied that he could not, that he had seen him write, but could not swear that the letter handed him was in his handwriting, or

that it was the signature of E. R. Harford. He was then dismissed from the stand, and Charles Hopkins, one of the Jurors, was sworn on the part of the defendant. The letter was handed him, and he was asked if he could prove the handwriting of E. R. Harford: he said he had frequently seen him write, but could not identify the signature as his. After some conversation between the defendant's Counsel and Lefils, Lefils was again called to the stand, and the letter handed to him, and he was asked to prove the handwriting. Plaintiff's Counsel objected, upon the ground that the witness had already been examined upon that point, and dismissed from the stand, being unable to prove it. The Court over-ruled the objection, and plaintiff's Counsel excepted.

It was admitted that search had been made by the administrator and heirs of E. S. Rees, for his letters of administration, without effect; that application had been made to the Central Bank for Sheriff's deed to the Bank of Darien also, without effect.

The Court charged the Jury, that both parties claiming under Henry Harford, the case turned upon the Statute of Limitations; that the proceedings to foreclose the mortgage was irregular, and that the sale, under such foreclosure, was void, and that the purchaser thereby acquired no title; yet, that his possession under that title might, by the lapse of time, have ripened into a good title; and whether he had a good title or not, depended upon the question, whether the estate of Harford had been so represented as to enable the Statute to run; that, from the evidence before them, they might presume administration had been granted to Rees—the case in 13 Georgia came up to that case—that shows that Rees was appointed administrator. Was that appointment correct, Reese not having been an applicant? It was! Every presumption was in favor of the correctness of the grant of the administration; and if correct here, there is an end of That the Statute (turning over the assets of this matter. Darien Bank) would vest title of the Darien Bank in the Central Bank, when taken in connection with the fact that

we find the Central Bank in possession of the property, renting it and selling it.

The following are the errors assigned:

1st. That the Court erred in charging the Jury that the case depended on the Statute of Limitations.

2d. That the Court erred in permitting Lefils to be recalled, to prove the handwriting of E. R. Harford, when he had been previously examined directly upon that point, and dismissed from the stand.

3d. That the Court erred in charging the Jury that the evidence showed that Rees was appointed administrator.

4th. That the Court erred in charging the Jury that the appointment of Rees was right and proper, he not having been an applicant.

5th. That the Court erred in charging the Jury that the Statute turning over the assets of the Darien Bank, vested the title of the Darien Bank in the Central Bank without a deed.

Judge McDonald being a stockholder in the Bank of Darien, did not preside in this case.

WARD; LLOYD, for plaintiff in error.

HARDEN, for defendant in error.

By the Court.—LUMPKIN, J. delivering the opinion.

This is an action of ejectment, brought by the administrator of Henry Harford, to recover real estate in the town of Darien. Both parties claim under Harford. It is not necessary, therefore, to go back of him to deduce title on either side.

The plaintiff claims as administrator, and the proof is, prima facie, sufficient to entitle him to recover. The defendant, on the other hand, says that this property was sold, as far back as 1827, as the property of H. Harford, the plaintiff's intestate, and bought by the Bank of Darien, at Sheriff's sale,

under a mortgage foreclosure; was taken possession of by the Bank of Darien, at the time of sale; transferred by that bank, or rather by an Act of the Legislature, to the Central Bank, as the agent of the State, for winding up the affairs of the Darien Bank, and sold by Col. Thomas, the director, to T. P. Pease, the defendant in ejectment; consequently, the defendant relies, both on his paper title and his statutory title, to protect him against the action.

[1.] The plaintiff replies, that the proceeding of foreclosure, under which the lot was sold, was absolutely void; and could, therefore, afford the defendant no protection. His Honor, the presiding Judge, sustained the plaintiff, so far as to decide, that the proceeding of foreclosure was so irregular, as that the sale under it did not amount to a perfect conveyance, to pass the title. He, nevertheless, held that it was good, as color of title, to support the statutory possession.

The irregularities complained of are two-fold: First, that twelve months did not elapse between the rule nisi and the rule absolute; and in the second place, that the proceedings to foreclose the mortgage, were instituted against the legal representatives of Henry Harford, and before administration was granted upon his estate.

Concede all this to be true, could the judgment of foreclosure, awarded by a Court of acknowledged jurisdiction, be attacked in this collateral way? We apprehend not. Much less can the validity of the sale under the judgment of foreclosure, be impeached on account of these alleged errors. If judicial sales could be thus impeached, it would overturn more than one half of the titles to property in this country.

If there was error then, in this branch of the case, and we are inclined to think there was, it was not against the plaintiff, but against the other side, in ruling that the judicial sale was void, and that the purchaser acquired no title, by reason of the irregularities in the proceedings to foreclose the mort gage. That possession of the premises under this sale, was sufficient to support a statutory title, there can be no doubt,

provided the estate of Henry Harford was so represented as to enable the Statute of Limitations to run.

[2.] And why was Rees not the administrator? The record shows, that application was regularly made for letters, citation published; and that the heirs and creditors were all represented; that by consent, letters were granted to Reese; that he gave the bond required by the Court; and that letletters did actually issue. Was there any want of jurisdiction in the Court, either as to the person or subject-matter? Will not all things be presumed to have been legally done, especially after the lapse of so many years? But it is said the proceedings themselves prove the contrary, or rebut the presumption. It is objected that the appointee was not an applicant for the office. Is this a violation of the law? And are the letters, on that account, void?

We admit that the practice of appointing a different person at the hearing from the applicant, is not in compliance with the letter of the Act of 1799. (Cobb, 311.) And moreover, there are strong objections against it. (12 Ga. R. 526. Still, we do not feel at liberty to change a construction which has uniformly and universally prevailed over the State for more than a half century. And least of all, in this case, where the record shows that all the contestants for the administration were before the Court of Ordinary. tion issued in the name of George B. McKinstry. The Bank of Darien was a caveator through Eben. S. Rees, its president, who, by consent of McKinstry, received the appoint-Wherefore the necessity to have another citation isment. sue?

Harford died prior to 1828. In January of that year, letters were granted to Rees upon his estate. It is probable, from the proof, that the heirs of Harford were of age at that time. In 1836, they filed a bill against the Bank of Darien about this same property. It is late in the day, to say the least of it, to seek to recover property which, more than a quarter of a century ago, was sold, and the proceeds applied to the payment of the debts of their ancestor. More espe-

cially when it further appears that this property has been subsequently sold by the Central Bank as the agent of the State, and the money appropriated to the judgment creditors of the Darien Bank!

[3.] But it is complained that no conveyance was executed by the Darien to the Central Bank to this property, as required by the Act of 1841. (Cobb, 139.) What of that? What if the Statute, itself, does not operate to transfer the legal title, without a deed, it shows this conclusively, that the Central Bank was in under the Darien Bank. itself, establishes that they held in privity, and that the Central went into possession under the Darien Bank. The evidence shows that the Central Bank took possession of the premises as a part of the assets of the Darien Bank. deed from Thomas, the director, to Pease, recites a conveyance from the Bank of Darien, pursuant to the Statute; and that the property conveyed by the Central Bank to Pease, was "part and parcel of the land formerly owned by the Darien Bank." But whether this conveyance was executed or not, was wholly immaterial, so far as the plea of the Statute was concerned.

[4.] Finally, was the recalling of the witness, Armand Lefils, justifiable? The course pursued by the Court, is supposed to contravene the 74th Rule of Practice. (2 Kelly, 480.) It is to this effect: "Witnesses shall first be examined by the party introducing them, then cross-examined by the adverse party. Further examination shall not be had but by leave of the Court first obtained, and then only upon the declaration of the Attorney or witness that a material fact has not been stated, to which all further inquiry shall be directed."

It is not denied but that this rule of the Superior Courts restricts the discretion of the Courts as to the permission to recall a witness, which was unlimited at Common Law. Have the Judges this power? Clearly not. Their power extends to and was intended to embrace all ground uncovered by the Statute or Common Law. For instance, by Statute,

power was given to the Courts of Law in this State to establish lost papers, without specifying the mode in which it was to be done. The Superior Courts have the power to supply the deficiency. I will not say that they have not the right to make new rules.

At Americus, in the case of *Perdue against John Bradshaw*, this Court held, upon the 66th rule, in accordance with this view, that the Courts had not the power to limit the signing of a *nunc pro tunc* judgment to the time of disposing of the appeal, when, by the Common Law, the discretion of the Courts was without limitation, as to time.

In the case before us, we believe that the Common Law rule is the best, and that the discretionary power of the Court was properly exercised in this case. Indeed, we do not see that the rule of Court was impugned. The witness was recalled to prove a single fact, to which his examination was confined. In the former part of his examination, he had stated that he had seen Harford write. He did not understand, perhaps, at that time, that this laid the foundation for the expression of his opinion; after being dismissed from the stand and understanding this, he returned into Court by the permission of the Court, and gave his opinion. duction of the letter thus proven by the witness and read to the Jury, was of small matter after all, either way, and could not have prejudiced the plaintiff's case.

Being fully satisfied that the law, as well as the equity of this case, has been rightly administered, we must refuse a new trial. Akin, guar. &c. vs. Anderson, guar. &c.

No. 46.—R. F. Akin, guar. of Susan Ranghill, plaintiff in error, vs. John W. Anderson, guar. of Margaret Williams, defendant in error.

[1.] W W, a free person of color, died, leaving a tract of land in the occupancy of M, also a free person of color, as his wife. S W, who was also a free person of color, claimed the land as the sister of W W and sued M for it: Held, that she was not entitled to recover the land of M.

Ejectment, in Chatham Superior Court. Decision by Judge FLEMING, February Term, 1855.

The points in this case arose upon the following special. werdict:

We find that Fanny Williams, a free woman of color, departed this life in the City of Savannah, some time in the year eighteen hundred and forty-three; that from the year eighteen hundred and twenty-five until the time of her death, she was the owner of and in possession of lot No. 35 and improvements, in Washington ward, City of Savannah; that the said Fanny Williams, at the time of her death, left two children, viz: Susan, the ward of the plaintiff, and William Williams, her surviving; that the said William Williams departed this life some time in the year 1850, without leaving a child or children: that at the time of his death and some time before, the said Margaret Williams, the ward of the defendant, was recognized by the said William Williams as his wife, and lived with him as such; that after the death of the said Fanny Williams, the said Susan and the said William Williams, went into the possession of the said lot and premises; and that upon the death of the said William Williams, the said Margaret kept possession of one half of said lot and improvements, and still continues in possession. If the Court shall be of the opinion that the said Susan is entitled, as the descendant of the said Fanny, to the entire lot and premises in dispute, then we find in favor of the plaintiff, with costs of Akin, guar. &c. ve. Anderson, guar. &c.

suit; and if the Court shall be of the opinion that the said Margaret, as the wife of the said William Williams, is entitled, by law, to the said premises in dispute, by reason of her marital rights, then we find for the defendant, with costs of suit. February 10th, 1855.

ELISHA PARSONS, Foreman.

Judge FLEMING, on the ninth of January, 1856, made the following decision:

By the special verdict which is annexed to this decision, it appears that Fanny Williams, a free woman of color, died the owner of and in possession of lot No. 35, and improvements, in Washington ward, City of Savannah; that she died, leaving two children surviving her, viz: Sasan and William Williams: that said Susan and William Williams, upon the death of their mother Fanny, went into possession of said lot and improvements; and I infer that each went into possession of one half; for the special verdict states, that upon the death of William Williams, Margaret, whom he had recognised as his wife, and who had lived with him at the time of his death. kept possession of one half of said lot and improvements, and still continues in possession. Susan, I presume, is in possession of the other half, and now claims the whole; her brother William having died without children. By the Act of 1819, (Cobb's Digest, 995,) all property held by any free person of color, at the time of the passing of the above recited Act, (Act of 1818,) shall not be deemed or considered as forfeited, but that thes ame shall remain in the owner, or in his or her descendants after his or her death.

By virtue of this Act, Susan and William Williams became the owners, as the descendants of their mother Fanny, of said lot and improvements. It is a fair inference, that as such joint owners, they agreed between themselves, that each should become the sole owner of one half of said lot and improvements. If it is said that they were incapable of making such an agreement, I reply that the lapse of time, from eighAkin, guar. &c. vs. Anderson, guar. &c.

teen hundred and forty-three to eighteen hundred and fifty, is sufficient to authorize the presumption that the arrangement was made with the sanction of their guardians, and through I cannot come to any other conclusion, than that William Williams was, at the time of his death, the owner and proprietor of the half lot now in the possession of Margaret, and which Susan is seeking to recover from her. As such owner, the said half lot must go to his descendants, and not to the descendants of Fanny, under the above recited Act. What is the meaning of the word descendant, in this Act? Strictly speaking, descendant means posterity—children. this be the meaning of the Legislature, then neither of the parties before me claim this property as descendant, under the Act; for neither is the posterity of the decedent, William One of the parties, however, is in possession, and no Court, I apprehend, in the action of ejectment, will turn a party out of possession, except in favor of the real owner, Plaintiffs in ejectment must recover on the strength of their own title, not on the weakness of the defendant's title. William Williams departed this life the owner of this half lot. Susan, to recover it in the action of ejectment, must prove that she is his descendant, not that she is the descendant of Fanny. Whether the property is escheated, there being no descendant of William Williams, is a question not now before I find Margaret in possession, and although it be true that she is without title, yet I cannot turn her out in favor of Susan, who is also without a title. I must leave the parties as I find them.

The above is the conclusion to which I have come, assuming that the Lėgislature, by the word descendant, meant children. I am very much inclined to think, however, that the Legislature did not use this word in this, its strict and literal sense. On the contrary, I understand the Statute as in effect declaring, that while free persons of color cannot acquire property in lands or slaves by purchase, yet they may, by descent or inheritance; and the person so inheriting, whether as child or other relation, takes as descendant, under

Akin, guar. &c. vs. Anderson, guar. &c.

the Statute. I am disposed to put this construction upon the Statute, because it expressly declares, that: All property held by any free person of color, at the time of the passing of the Act of eighteen hundred and eighteen, shall not bedeemed or considered as forfeited, but that the same shall remain in the owner, or in his or her descendants, after his or her death.

If I am correct in this construction of the Statute, then the naked question for my decision is, whether Susan or Margaret is the heir of, or, in the language of the Statute, is the descendant of William Williams?

Susan claims as his sister: Margaret claims as his wife. There would be no difficulty in saying that a wife takes in preference to a sister; the difficulty is in the question, whether Margaret be the wife of William Williams? And on this question we are met by the broad proposition, that a free person of color cannot contract matrimony. The Supreme Court of Georgia have said as much in the case of Bryan vs. Walton, (14 Ga. Rep. 201.) The question was not directly before the Court, not being involved in the issue of that case; but I find no fault with the decision, as I understand it. effect of the decision is, that the Act of manumission conferred upon the slave the power of going whither he pleased, and nothing more. That to contract—to marry—to vote—something more is required besides the mere act of enfranchise-In one word, that persons of color have no rights or privileges, except what may be conferred upon them by Stat-To all this I assent; every proposition meets the approbation of my most deliberate judgment; and I admit that there is no Statute authorizing free persons of color to contract matrimony, so as to authorize them to bring a suit for divorce, or to institute a criminal prosecution for adultery; and to that extent they cannot marry. But the Act of 1819 recognizes marriage among free persons of color, so far as may be necessary to determine the question of descent. I cannot doubt every relationship recognized in the law, is deducible from the relation of husband and wife, except, inAkın, guar. &c. ss. Anderson, guar. &c.

deed, that a bastard is recognized as the child of the mother, but as to the father, he is, in law, the child.

Now the Act of 1819 either recognizes the relation of the husband and wife, to the extent I have stated, viz: so far as may be necessary to determine the question of descent, or the Statute must be confined, in its operation, to descendants from the mother; for descendants from the father cannot be traced, independent of the relation of husband and wife. But the Act of 1819 is not thus restricted; its language is: "All property held by any free person of color, shall not be deemed or considered as forfeited, but that the same shall remain in the owner, or in his or her descendants after his or her death."

If this Statute does not recognize marriage among free persons of color, to the extent I have stated, then the relationship of father and child among them cannot exist; and the property of a free man of color must go to his relations by the mother's side, to the exclusion of the children of his own loins.

Marriage, then, among free persons of color, is recognized by the Act of 1819, so far as to determine the question of descent. In the table of descents, the wife stands in the first degree along with children. My judgment then is, that Margaret, as the wife of the said William Williams, is entitled, by law, to the said premises in dispute; and it is ordered that the verdict of the Jury be entered in accordance with this judgment, as directed by them in the special verdict hereto attached.

W. B. FLEMING, Judge E. D. Ga.

On this decision, the following errors are assigned:

1st. That the Court erred in inferring, that as joint owners, the said Susan and William Williams agreed, between themselves, that each should become sole owner of one half of said lot and improvements in dispute, the said parties having guardians and being incapable of making and execu-

TOL. XIX-30

Akin, guar. &c. vs. Anderson, guar. &c.

ting such an agreement, and no written or other evidence of the fact being before the Court.

2d. That the Court erred in presuming, from the lapse of time, that such arrangement was made with the sanction and approbation of their guardians, and through them, in the absence of all written or other evidence, and against the terms of the special verdict rendered.

3d. That the Court erred in deciding that William Williams was, at the time of his death, the owner and proprietor of the half lot now in dispute, so as to vest in Margaret, the defendant, as his wife.

4th. That the Court erred in not considering the premises in dispute, as the property and estate of Fanny Williams, as found by the special verdict, and not the property of William Williams, who jointly occupied the premises with Susan up to the time of his death.

5th. That the Court erred in deciding that marriage was recognized by the Act of 1819, among free persons of color, so far as may be necessary to determine the question of descent; the question submitted by the special verdict being, whether the plaintiff's ward or the defendant's ward, take equally of the estate of Fanny Williams, or whether Susan, the surviving child, takes exclusively as a descendant.

6th. That the Court erred in deciding, that Margaret Williams is entitled, by law, as the wife of William Williams, to the premises in dispute, and directing judgment to be entered on the special verdict in her favor.

DeLyon, for plaintiff in error.

GORDON, for defendant in error.

By the Court.—Benning, J. delivering the opinion.

[1.] The Court below considered the special verdict as intending to say that a partition of the land had been made by the brother and sister. Williams Williams and Susan Williams,

Akin, guar. &c. vs. Anderson, guar. &c.

between themselves, at some time before William's death. Whether this is the true interpretation of the verdict or not, seems to admit of a doubt. But a doubt is not sufficient to justify the disturbing of the decision of a Court.

We assume, then, that there had been a partition between the brother and sister.

If there had been a partition, then the only question in the case is, whether Susan Williams inherited the land in dispute from her brother William? If she did, the plaintiff had title; if she did not, the plaintiff had no title; and if the plaintiff had no title, the defendant had the right to recover, whether he had any title or not.

Did Susan inherit the land from her brother William? If she did, she must have done so, either by virtue of the Act of 1819, which is applicable to inheritance among free persons of color only, or by virtue of the Acts which regulate inheritance generally; for there is no other Act or law on the subject of inheritance.

The part of the Act of 1819, that bears on the question, is in these words: "All property held by any free persons of color, at the time of the passing of the above-recited Act, shall not be deemed or considered as forfeited; but the same shall remain in the owner or in his or her descendants, afterhis or her death." (Cobb's Dig. 995.)

Susan having been the sister of William, cannot be a descendant of his. Therefore, she can take nothing by this Act.

William died without children. But he left a wife, Margaret.

Such being the case, none of the Acts which regulate inheritance generally, give to his sister any part of his estate. On the contrary, one of these Acts, that of 1829, gives the whole of his estate to his wife. (Id. 295.)

This is certainly so if William had a wife—if Margaret was his wife.

But it was argued that Margaret was not his wife; that he

Akin, guar. &c. vs. Anderson, guar. &c.

could not have a wife; that the law does not recognize the relation of husband and wife among free persons of color.

If this argument is good, it must be so because this is a true principle, viz: That no one of the relations from which relative rights spring, such as that of husband and wife, parent and child, &c. exists among free persons of color, unless it is made to exist among them by a special law.

There is certainly no special law which declares that the relation of husband and wife—the relation of marriage, shall exist among free persons of color.

But if this principle be true, it proves, not only that William, the deceased free person of color, could have no wife—it proves, also, that he could have no sister; it proves that he could have no next of kin, except "descendants." For there is no special law which declares that the relation of brother and sister, uncle and aunt, may exist among free persons of color. There is a special law which recognizes the relation of parent and child among free persons of color; that law which I have quoted—a law which allows "descendants" among free persons of color, to inherit from their parents. There is no special law which recognizes any other relation.

But if there is no special law which recognizes Susan Williams as the sister or the next of kin of William Williams, of what avail is it to her title, as plaintiff or plaintiff's lessor, that there is no law which recognizes Margaret Williams as the wife of William Williams? What profit is it to a plaintiff in ejectment, that the defendant has no title, if he has none?

So that, take what view of this case we may, we come to the same conclusion, viz: that the plaintiff was not entitled to recover.

We think the judgment of the Court below ought to be affirmed.

No. 47.—JANE SMITH, caveator, plaintiff in error, vs. WM.
J. DUNWOODY et al. propounders, &c. defendants in error.

[11.] James Smith left to the caveator, his wife, Jane Smith, for life, \$500 annually, to be paid her with the annuity lefther by her former husband; the choice of any five of his house servants; the right to occupy any of the places he might die possessed of, with twenty acres of land, and the buildings attached thereto, including the furniture therein, with carriage, and horses, and stock; \$450, the price of one of her negroes sold by the testator, together with all the monies she may have in her possession for safekeeping, at the time of his death, to be in lieu of dowry claims; if she wishes it, annually, during her life, a supply of provisions for her household, from his estate. If his child, E. W. Dunwoody, survives his wife, all these privileges to be turned over to her; to whom, also, he gives his Brighton Summer Seat in McIntosh County, in fee-simple; on the death of his wife, the \$500 directed to be paid to her annually ceases, and then this sum is to be paid to certain named heirs of his deceased brother, Wm. Smith-each to receive \$100. The gold watch left to testator, by his deceased brother, he gives to his son, James L. Smith. All lands owned by him at his death, within three miles of his Sidon estate, shall be considered as an appendage to said estate, with all the negroes thereon, and all others belonging to him at the time of his death, whether lent or hired out; and this to be considered his general estate, and to be kept in perpetuity. As neither of his heirs is competent to purchase the said grounds, and his mind revolts at the idea of division and separation of families, the annual .income of said estate, after providing for the bequests to his wife and daughter, and all necessary plantation expenses, to be divided equally, share and share alike, between his grand-sons, Wm. J. Dunwoody, Dean M. Dunwoody and John F. Dunwoody, them and their heirs forever, and to his two grand-daughters, J. A. Jones and Mary E. Dunwoody, to them and the heirs of their bodies, as they may direct by will, and to his great grandchild, C. E. M. Shackelford, to be disposed of in the same manner as is provided in a certain deed of gift to her, which is described; estimates the annual product of his estate at \$9.000, and directs (as soon as after making provision for antecedent bequests and plantation expenses) the sum of \$6.000 to be raised, and as has been distributed as before provided, that out of the excess his executors shall give, annually, to each of his negroes above the age of seventeen years, the sum of \$5; and \$100 to be annually appropriated in aid of the ministry of the Baptist denomination, the recipient to give his services at least twice a month; the chapel on the estate to be kept in good repair. For the gradual emancipation of his negroes, provides, that upon his decease, an annual register of births on his estate to be kept, and every tenth negro born shall, at the age of eighteen years, have the option of having his freedom; and if he accept it, shall be turned over to the Col.

Society U. S. America; nominates eleven executors; in the event of a vacancy, remaining executors may appoint, at their annual meeting, recommended to be on the first Monday in April. If they fail, any of the Courts and authorities of McIntosh may appoint; recommends the appointment of one of the executors as superintendent, at a salary not exceeding \$1.000, who is to keep a book, and when approved at the annual meeting, is to become a record; requests his executors not to charge commissions; any property, that is, monies at interest from bonds, notes, accounts, houses, lands, found to be his and not included in that left in perpetuity, to be equally divided between his three grand-sons, share and share alike, to them and their heirs forever, but not to interfere with the provisions for his wife and daughter. Upon the construction of this will: Held, 1. That a part of the provisions of this will are valid and can be executed; and others illegal, because they require the estate to be kept together in perpetuity, in order to carry them out. 2. That the trust term will continue in the executors, in whom it vests, as such, just so long as it is necessary to accomplish the legitimate purposes of the will, and not a moment longer. 3. The bequests to the wife and daughter require the trust to continue. certainly to the death of Mrs. Smith, if not until that of Mrs. Dunwoody, unless otherwise accommodated. 4. The income of the general estate, being devised and bequeathed to his five grand-children and his great grandchild, with certain deductions to be made therefrom, provided it exceeded \$6,000, indefinitely and without limitation of time; and there being no disposition over of the corpus to any one else, these devisees and legatees took an absolute fee in the capital of said estate, the possession of which was postponed until the valid purposes of the trust term were effectnated. 5. If a gift of slaves be coupled with a provision, that every tenth of the future increase be emancipated, the condition is void, as repugnant to the rights of property and the estate granted.

Caveat, in McIntosh Superior Court. Decided by Judge FLEMING, Spring Term, 1855.

The Will of James Smith, was as follows:

McIntosh County, State of Georgia:

In the name of the Holy Trinity, the Father, Son and Holy Spirit:

This first (1st) day of December, One Thousand Eight Hundred and Fifty-three, (1853) I, James Smith, of sound mind and memory, of said County and State, being far advanced in age, and must shortly depart from this life, deem

it right and proper, both as respects myself and family, I should make a disposition of all the property which a kind Providence has blessed me; I therefore make this my last will and testament, in the simplicity of words, as to avoid all technical words or sentences touching the same, and in no instance it must be understood otherwise than my express will and demise; nor shall any lawyer, Court or Legislature, have, directly or indirectly, have anything to do with it, in its explanation or adjustment of the same; otherwise, should an occurrence happen (among such as would be called wise among my heirs) as to create a difference of understanding my views, then, and in that case, a choice of five (5) of the most disinterested persons may be made choice of, such as not hearing the parties on either side expressing their aiews, until the question or difficulty comes up before them for judgment or adjustment, whose decision is made final to the question submitted, as if settled by myself; and those five disinterested friends, shall be selected from each of my executors; having named one (each;) whose names to be thrown into a hat or box, and the five first drawn out shall be the person thus chosen; and I, James Smith, make this my last will and testament, and do hereby revoke and annul all others heretofore made by me, touching all matter and things having a bearing upon all my worldly interest.

First. I, James Smith, recommend my soul to God, my Father and Creator, beseeching him to receive it in mercy, and judge it not according to its merits, but according to the merits of Jesus Christ our Lord, who offered himself as a sacrifice to God his Father, for all his elect, according to his purpose, unworthy as we are—I, myself, among the chief of sinners. Thus I implore Almighty God to pardon all my sins and transgressions, and thank him for the good hope I entertain, through Christ, I shall be delivered therefrom under those views. I desire that my body be buried in a decent and christian manner, suitable to my circumstances and condition, avoiding all such useless forms and fashions, which does not comport in glorifying God and the christian profes-

sion; my soul I humbly hope and trust may rest with Him who gave it in an eternal salvation, through that blessed Lord and Saviour Jesus Christ, who's religion I have professed, and humbly hope and trust, enjoyed for many years, and formed a comfortable and abiding hope.

I, James Smith, desire that all my debts be paid without delay, by my executors, (hereinafter) named, as I am unwilling my creditors should be delayed from their just dues; especially as there will be no necessity for it. I, James Smith, give and devise to my dear wife (Jane) should she survive me, (during her life) for her support and comfort, in and from the following provisions herein made, to-wit: In the first place, the amount of Five Hundred Dollars (\$500) annually paid her; this, with the annuity paid her semi-annually, left her by her former companion (in life) with the following, to say, the choice of any of my house servants, to the number five, with privilege of the occupancy of any of my places dying possessed of; to say, Welharn (Cobb County) Brighton and Sidon, McIntosh County, embracing the ground of twenty acres, attached thereto, as only to embrace within the same all such buildings as attached to the dwellings for her choice of residence, including all such furniture found therein, with my carriage horses, carriage and stock of all kinds; this for her comfort during life. And as in our connection was formed, she owned a negro woman, (named Lucy) finding her a supernumerary (among others in my house) as well as naughty in her character, (in our domestic relations, it was unanimously agreed upon in the sale of her thus, the sum of four hundred and fifty (\$450) dollars could only be obtained for her,) which sum, (\$450) with all other moneys she may have in safe-keeping for me, (at my death) shall be paid over to her (as cash) independent of any other provision made her in this, James Smith's last will and testament, to be applied by her, as may be expedient, in her wisdom and good judgment. all this arrangement for my dear wife, shall be considered as sufficient for covering all dowry claims that may arise in her behalf, being a full compensation for the same.

in addition to the above provision made my dear wife, (Jane) she shall be entitled, annually, during life, (if wished for) a support of provisions from my estate, James Smith, as sufficient to support her household. In the event my dear child, Mrs. Elizabeth West Dunwoody, should survive her, (my dear wife Jane.) all of those said privileges (as above stated,) to-wit: In the occupancy of any of my places as named. my carriage, horses, stock of all kinds, the choice of five of my house servants, shall be turned over to her, my dear child. (E. W. Dunwoody) in like manner, and arranged as to be enjoved, as if more particularly specified, during her life. Brighton (summer seat,) McIntosh County, with all the lands adjoining, to say as per survey, containing about five hundred (500) acres, (see plat) with all its appendages, &c. James Smith, bequeath and give to my dear child, E. W. Dunwoody, in fee simple, to her and her heirs forever.

I, James Smith: It is my will and desire, after the death of my dear wife, (Jane) the sum of five hundred (\$500) be paid over to the heirs of my deceased and ever to be remembered brother, (William Smith) to-wit: Doct. Sidney Smith, James L. Smith, Sarah W. Smith, Elizabeth W. Smith and Hannah M. Smith, to share and share alike, this said five hundred (\$500) dollars, each receiving one hundred (\$100) dollars of it, to them and their heirs forover, as a small testimony and regard for his memory, as well as the gold watch left me at his decease, I give to his son, Jas. L. Smith, at my death.

I, James Smith, wills and devise, that all the lands owned by me at my death, within three (3) miles of my valuable estate, named and known as the Sidon estate, made up of sundry surveys and grants, (as reference will show,) to be considered as an appendage of said estate, with all the negroes or slaves thereon, as well as all others found to be mine at my decease, whether loaned to my several grand-children or great grand-child or children, as well as hired out, (as if named) shall be considered as my general estate, to be kept in perpetuity, from the circumstance of neither of my heirs are competent the purchase of said

grounds constituting said estate, as to make a division; and my mind revolting in the separation of their families, for a division among them, thus I, James Smith, under that view and feeling, the following is my will and devise, for the annual appropriation of all the annual income arising out of said estate, (those excepted in the provision made for my dear wife (Jane) and my beloved daughter E. W. Dunwoody, during their lives,) to-wit: I, James Smith, wills, after all necessary plantation expenses or disbursement are met or paid off, with the several provisions made for my dear wife (Jane,) as before expressed, (regarding economy,) to be divided in the following manner, (reserving such amounts as will be hereafter herein named, for other purposes required.) equally. share and share alike, between my following children, grand and great grand do. to-wit: My grand-sons, Wm. J. Dunwoody, Dean M. Dunwoody and Jno. F. Dunwoody, to them and their heirs, forever, and to my two grand-daughters, Mrs. J. A. Jones and Mary E. Dunwoody, to them and the heirs of their bodies; and in the event of no heir or heirs of their bodies, then and in that case, such a distribution as their wills and desire may make; and to my great grand-child, S. E. M. Shackelford, to come under the same rule of disposition as that provided for her in a deed of gift of sundry negroes, found recorded McIntosh County Superior Court, book K, folio 260, 21st March, 1853, referring thereto; I, James Smith, bearing in mind the past blessings a kind Providence has afforded me, from the success of labor and culture of this said estate, and in anticipation of the future bearing testimony to the fact; from the same care and attention, a safe calculation can be made, of an average crop from ten to twelve thousand bushels rice can be annually calculated on, (Providential visitations excepted,) thus, the amount of \$9000 might be annually expected, for all of the above arrangement; reserving, as beforesaid, an amount to meet, as will be stated. Thus, then, I, James Smith, wills, that as soon as six thousand (\$6000) dollars is made subject to meet all the foresaid. arrangements, paying off, first, plantation disbursements, my

dear wife (Jane) her annuity, with the four hundred (\$450) and fifty dollars returned her for the amount the said servant Lucy sold for, (as stated,) then, and in that case, I, James Smith, wills that the keeping in view the five hundred (\$500) dollars, provided for the said children of my beloved and departed brother William, as before named, coming under the rule or arrangment made for its payment, not to be lost sight of, then, and in that case, I, James Smith, wills, so soon as that sum of six thousand (\$6000) dollars is made subject for such provision meeting all other requisitions as stated; it is then enjoined upon my executrixes and executors, (as will hereafter named,) pay over from such sums of money, over the said six thousand (\$6000) dollars, or so much of it as to give -each of my servants or slaves, annually, (so long as such moneys can be obtained,) each one, over the age of seventeen years, (remembering the superannuated among them,) as a small testimony of my regard for them, this for their little comfort: to say, five (\$5) dollars each; as well as in remembrance of their spiritual relations, I do, James Smith, wills, that one hundred (\$100) dollars be annually appropriated in aid of the ministry, (of one of good report,) of the Baptist denomination, (as being preferred by them,) whose labors, for this sum appropriated, shall give his labors at least twice The chapel on the estate, to be kept in good repair.

As my mind has long been exercised, not from any view that slavery is to be considered a sin, but otherwise, fully justified from the oracles of truth, that I, James Smith, wills, that provision for them, that their situation might be measurably meliorated, or make better their situation gradually, that will prove in time, (measurably) a better condition for them.

Thus, for that end, I, James Smith, for their gradual emancipation, the following provision I do hereby make for them, in this my will, to-wit: that after my decease, an annual register will be kept of all the births occurring on said estate, the same being recorded in the annals of the county, in such

Courts and records of the same having cognizance of such public matters, as the county requires, and that every tenth (10th) birth, at the age of eigh(18)teen years of age, shall have faithfully made known to him or her (as the case may be) this arrangement or provision made for carrying out this my object; and in the event of such accepting of it, such shall be made known or reported to the society called the Colonization Society of the United States of America, for the purpose of providing and arranging for their freedom, (of all those accepting,) and turned over to the said society, coming under this rule; and should such reject this provision made, then and in that case shall continue in slavery; if a female, it shall not exclude or deprive her issues in coming under the rule so provided; such coming under this provision, shall be supported as the rest of the slaves, until the said age of eighteen (18) years so required for their choice, either to accept or refuse.

And in conclusion of this, James Smith's last will and testament, for carrying out all the requisitions therein named, do hereby appoint and nominate the following persons as my particular relatives and friends, as my executrixes and executors, to say: My dear wife, (Jane) my daughter, Elizabeth W. Dunwoody, my executrixes, with the following, my three grand-sons, (as if named,) with those of my particular friends, to-wit: united with them, the Rev. John Jones, John Dunwoody, (sen.) of Roswell, Cobb County, James H. Couper of Glynn County, of (Hopeton), Alexander Mitchel, of Darien, McIntosh County, James Jones, of Liberty County, William R. Gignilliat, of McIntosh County, as my executors and executrixes, to this my last will and testament, touching all and every thing herein expressed; and in the event of vacancy, wanting the number as nominated herein, (to say, 11,) the remaining number at their annual meeting, on said estate, (which is recommended to be on the first Monday of April,) shall appoint such one or more, if required, to fill such vacancy; to fail in doing so, any of the Courts or authorities of McIntosh County are permitted to do so; and

in either case, to be as binding as if done by me, James Smith.

I, James Smith, for the harmony, peace and good feeling of all parties interested, that at the annual meeting on said estate by these my executors and executrixes, for the arrangement and adjustment of said estate, to appoint one for the superintendency of it annually, for whose services the sum not over one thousand (\$1.000) dollars shall be appropriated as to cover overseer's wages and his superintendency, whose duty is to keep a day-book of all accounts, &c. emanating for and against said estate, &c.; and when approved of at the annual meeting, (on said estate,) after being approved of and signed by the acting ones, it shall be made a record on the county, for such having any interest therein.

In conclusion, I, James Smith, must beg the pardon of those my friends, as herein named, as my executors and executrixes, although the laws of the State make provision for their commissions under such appointments, I must say, from so many divisions provided for, &c. I must beg, here, not to admit; and thus, throw myself on their clemency, for my rejecting any commission being claimed or charged by them. And as regards any other property I, James Smith, may be found possessed at my death, as not included in that left in perpetuity, to-wit: monies at interest, either from bonds, notes, accounts, houses, lands, &c. shall be equally divided between my three grand-sons, to say: William J. Dunwoody, Dean M. Dunwoody and John F. Dunwoody, share and share alike, to them and their heirs forever, so as not to interfere in any arrangement from that provision made for my dear wife, (Jane) as well as for my daughter, (their mother,) E. W. Dunwoody, as stated in this my last will and testament, as, witness my hand and seal to above date.

Test—

JAMES SMITH.

CHAS. H. McIntosh,

THOS. S. BOND,

J. ROCKENBAUGH,

Not. Public.

Upon caveat to this will, the following special verdict was taken, by consent:

In the matter of the last will and testament of James Smith, application by Wm. J. Dunwoody, Dean M. Dunwoody and John F. Dunwoody, three of the executors named in the said will, to prove said will and testament, in solemn form, and to admit the same to record, decision by the Court of Ordinary, and appeal therefrom by the caveators to the Superior Court, we, the Jury, impannelled to try said case upon the appeal, do find that the said last will and tesment of the said testator, James Smith, was signed by the said testator, in the presence of three credible and competent witnesses, who, at the request of the said testator, and in his presence, and in the presence of each other, subscribed the said last will and testament, as attesting witnesses thereto; that the said testator, at the time of signing said will, was in his right and proper mind, and that the said will was, in every respect, properly and legally executed by the said testator, so far as the formal execution is concerned. And, further, if the Court shall be of opinion, and shall decide, that upon the law arising on said will, the said will is good and legal, and capable of legal operation and effect, then we find for the will and the propounders thereof, and that the same be established as the last will and testament of said James Smith. and be admitted to probate and record; but if the said Court shall be of opinion, and decide that the said will cannot be supported according to law, and cannot operate consistently with the laws of the land, then we find for the caveators and against the will, and that the same be set aside and probate and record thereof be refused.

Upon this verdict, Judge FLEMING decided as follows:

The special verdict in this case, and which was rendered with the consent of the parties, disposes of the first ground of the caveat, to-wit: that the paper offered for probate as

the will of James Smith, was not executed by the testator according to law.

The questions made and argued, and which I am called upon to decide, arise under the third ground of the caveat, viz: "that the provisions of the said will are contrary to the laws and policy of the State of Georgia, and cannot legally be carried into effect."

The provisions of the will referred to in this ground of the caveat, are the clause providing that the Sidon estate shall be "kept in perpetuity," and the clause providing, or rather, professing to provide for "gradual emancipation." will, in my judgment, does provide that the Sidon estate shall be kept in perpetuity, and I have no difficulty in saying that this provision is illegal, and absolutely null and void. clause as to emancipation, is also void, because it necessarily depends upon the perpetuity clause. The provisions of the will are such that the Sidon estate must be kept in perpetuity, or the clause as to emancipation cannot be carried out. it seems to me, cannot fail to appear to the most superficial If this be so, then it is unnecessary to reader of this will. consider the question whether the emancipation provided for in this will be domestic or not. That question can only become important in the event that the emancipation clause could be so separated from the perpetuity clause, as not to dependent upon it for its execution. But this is impossible, and the will itself is the best argument to prove it. The next question in order is, whether the will, being void in part, is void altogether. This question has been decided in a recent case by the Supreme Court of Georgia. Judge Lumpkin says! "And although void as to the emancipation clause, so as to create an intestacy as to the slaves, it may, neverthetheless, be valid, as to the other items. By the 17th section of the 1st article of the Constitution, it is provided that no law or ordinance shall pass, containing any matter different from what is expressed in the title thereof; and yet, no Court in Georgia has ever held that the whole Act was a nullity,

but only so much and such parts thereof as were obnoxious to this constitutional inhibition." (16 Ga. R.)

A will, then, void as to some of its items, may yet be good and valid as to other items. What, then, let us inquire, is the fact in regard to the will before me? Setting aside the perpetuity and emancipation clauses, has Mr. Smith disposed, by will, of the whole or any part of his property; or, has he died intestate, as to the whole or any part of his property?

For the answer to this question, I propose to look strictly to the will itself. I shall not assume the most delicate and responsible office of "making another will for the testator, when his declared intention necessarily fails." It is my purpose to let the will speak for itself.

The provisions of the will in favor of Mrs. Smith, are free from all objections. She has, by the will, an annuity of five She has the choice of her house servants. hundred dollars. the choice of living at Welham, Brighton or Sidon, with the use of the furniture that may be found at the place of her choice, also the use of carriage and carriage horses, and the use of the stock of all kinds: "this for her comfort during There is also given her the sum of four hundred and fifty dollars, "with all other monies she may have in her safe keeping" at testator's death. These provisions in her favor to be in lieu of dower. There is also given her annually, during life, (if she wishes it,) provisions from the plantation for her household. In all this there is certainly nothing illegal or impossible. These provisions of the will must, therefore, stand as part of the last will and testament of James Smith.

The will then proceeds to provide, that in the event Mrs. Dunwoody, the daughter of testator, should survive. Mrs. Smith, then certain privileges granted Mrs. Smith during life, should be "turned over" to Mrs. Dunwoody, to be enjoyed by her during life. The Brighton Summer Seat, containing about five hundred acres, is given in fee simple to Mrs. Dunwoody "and her heirs forever." The sum of five hundred dollars is given to the children of his (testator's) deceased brother, share and share alike. Testator gives his gold:

watch, which had been left him by his brother, to James L. Smith. So far, we have seen nothing illegal or impossible. These items of the will are good and valid, and so far as these items have disposed of property, Mr. Smith certainly has not died intestate. These items, however, dispose of but a small, very small, part of his property. The great bulk of his estate remains yet to be disposed of, and the question is, what disposition has he made of it, or, rather, the question is, has he made any disposition of it? or, has he died intestate as to the balance of his property?

This question arises under the following clause of the will: (Here followed the clause.)

I propose to give, in my own language, what I believe to be a true abstract of this clause of the will:

First. Mr. Smith provides, in this clause of his will, that his Sidon estate, consisting of certain lands and negroes, shall be considered as his general estate, and kept together in perpetuity; that is to say, never to be alienated or divided.

Second. The reason why he wishes this estate kept in perpetuity is, because, in his opinion, neither one of his heirs is able to purchase the shares of the other heirs, and he is not willing that the family ties among his negroes should be broken by a division.

Third. He provides that the annual income of this estate, subject to certain charges, shall be divided, share and share alike, between his children, grand-children and great grand-children, naming them. He says children, but does not name any child, but only grand-children and great grand-child. The gift to his great grand-child is upon the same terms as are mentioned in a deed of gift of sundry negroes, to said great grand-child, to be found on the records in McIntosh Superior Court.

The above is, I believe, a true abstract of this clause of the will. The first provision, that the Sidon estate shall be kept in perpetuity, I have already decided to be null and void. True, it was contended in the argument before me, that this

was no perpetuity. But the testator has used the word perpetuity, and I must suppose that he used it according to its legal meaning and effects. If I could gather from the words used by the testator that there was any period within his contemplation when this property could be alienated, and if that period was within the bounds prescribed by law, I would cheerfully suppose that he had used the word in that limited But there was evidently no period in the mind of the testator in reference to which this word was used. contrary, we find him in a subsequent part of this will, providing for the filling of vacancies in the number of his executors, which, if carried out, would secure a perpetual succes-The very reason which he gives for this perpetuity clause shows that he meant what he said—a perpetuity; for the reason he gives is, that no one of his heirs can purchase from the others, and his mind revolts at the idea that his slaves should be separated. Not that they should be separated within a given time, but that they should ever be separa-It is, I apprehend, in accordance with this feeling, that he makes provision for perpetual succession among his executors.

The third and last item in this clause of the will is, the gift of the income to his grand-children and great grand-child. Caveators, I know, deny that the income is conveyed. This question I will consider hereafter. Assuming, for the present, that the income was conveyed, what is the legal effect of such conveyance? Does it convey the principal?

The question has been, as I conceive, decided by the Supreme Court of Georgia, in the case to which I have already had occasion to refer. I quote that decision at length upon the point. (Here follows the decision upon Bledsoe's will.)

This decision is so full to the point, that a gift of the income of property without limitation, is an absolute gift of the property itself, that I deem it unnecessary to refer to any other authority.

This brings me to the question, has Mr. Smith given the

income of this property, without limitation as to time, to his grand-children and great grand-child?

His will is, that "all the annual income arising out of said estate," be given to his grand-children and great grand-child, share and share alike, subject to certain deductions, which I will hereafter notice, to his grand-sons, and "their heirs forever:" to his grand-daughters and the "heirs of their bodies;" and in the event of no heir or heirs of their bodies, then, and in that case, such a distribution as their wills and desire may make;" and to his great grand-child, upon the same terms as are mentioned in a "deed of gift of certain negroes," which deed is upon record in the McIntosh Supe-This is certainly a gift of all the income, without the limitation of time, unless the effect of his words is prevented by the deductions from that income, for which he has The argument here is, that the income is not conveved, because, if so, then the other legatees are cut off, there being no fund to pay. Is this so?

He bequeathes the sum of four hundred and fifty dollars, absolutely, to his wife. Is this inconsistent with the gift of the income to others? I think not—certainly not more inconsistent with a gift of the income than with a gift of the property itself.

May not a man give his property to A, and incumber it with a debt of four hundred and fifty dollars, or any other sum, to B? And when the debt is paid, is not the property the property of A? And why may not the income of property be given in the same manner? And when the debt is paid, does not the income belong to the person to whom it is given?

He also bequeaths to his wife an annuity of five hundred dollars during life, and after her death this annuity is to be paid to his daughter during life. What is this but a charge upon the income—not a perpetual charge—it is limited to the lives of his wife and daughter; it is nothing more than a debt, for which he has thought proper to make his legatees chargeable. It is no more inconsistent with an absolute gift of the income,

or of the property itself, than that other item of his will, which directs his executors to pay his debts without delay. As well might it be urged, that the income is not given, because if so, then creditors must go unpaid; for there would be no fund with which to pay.

There is, also, a bequest of five dollars, annually, to each of his negroes, over the age of seventeen years; and also, the sum of one hundred dollars, annually, to be paid to a Baptist preacher, of good report, who, for said sum of one hundred dollars, "shall give his labors at least twice in the month, in the chapel on the estate to be kept in good repair." These bequests depend upon the perpetuity clause in this will, and for that reason they are null and void. Being null and void, they cannot affect the gift of the income, or of the property.

But it is argued that this income is given upon the condition precedent that the estate shall be kept in perpetuity, and that the condition being void, the gift is void also. It is further argued, that the general intent of the testator was to create a perpetuity; that this general intent being void, the whole will is void; as the whole will but points out the mode and manner in which the testator wished this general intent to be carried out.

What reason does the testator give for wishing this property kept in perpetuity? The reason is, that neither of his heirs is able to purchase it from the other heirs, so as to prevent a separation of families among his negroes. are we to infer? That if any one of them had been able to make the purchase, he would have bequeathed and devised the whole to him, charged with the proportionate shares of the other heirs and legatees. Under these circumstances, a separation among the negroes might take place, but the testator would have no connection with it. He would have done what he conceived his duty in the premises, and the separation, if it took place, would be the act of another. words, the testator would have given the whole Sidon estate, land and negroes, to one, if there had been one among his heirs able, in his judgment, to pay the other heirs their pro-

portionate shares. In this there would have been no perpetuity. Under such circumstances, the testator would not have felt it his duty to provide for a perpetuity. From this I infer that the great object of the testator was, that his heirs and legatees should have this property. His humane feelings, however, revolted at the idea that his negroes should be separated by any act of his own; he would, therefore, in the first instance, have left all his negroes to one of his heirs, he to pay the others their proportionate shares, if, in his judgment, there had been one among his heirs able to do so; but not thinking this, he leaves the income to be equally divided between them, believing, I doubt not, that in this way the negroes would be kept together; but not, as I think, upon the condition that they should be kept together in perpetuity; for if, in his judgment, there had been one among his heirs able to take all, such would have been his will, and we would never have heard of a perpetuity. This is not a matter of inference, it is what he himself says; his language is, that the Sidon estate "shall be considered my general estate, to be kept in perpetuity," (now why?) "from the circumstance of neither of my heirs are competent to the purchase of said grounds constituting said estate." If, then, either one of his heirs had been able to purchase, he would not have desired a perpetuity. He was evidently willing to leave the question of a separation among his negroes with either one of his heirs, if, in his judgment, there had been one among them able to pay the others their proportionate shares. This, in my judgment, is the legitimate and necessary effect of the language he has used. My judgment then is, that this Sidon estate is, by this will, bequeathed and devised to the grand-children and great grand-child of the testator, share and share alike, encumbered with certain charges in favor of his wife and child, which charges will cease upon their death.

Upon this decision, the following errors are assigned:

1st. Because the Court erred in deciding, that upon the whole law arising on said will, that the said will was good and legal, and capable of legal operation and effect.

- 2d. That the Court erred in not deciding that the will was void, on account of its conflict with the Statutes of the State on the subject of emancipation.
- 3d. Because the Court erred in not deciding that the provisions of the said will, with regard to the Sidon estate, and the property connected therewith, were void, on account of their conflict with the laws of this State, regarding perpetuities.
- 4th. Because the Court erred in deciding that the emancipation clause was rendered nugatory by the perpetuity, whilst the perpetuity itself was inoperative, as against other provisions of the will.
- 5th. Because the Court erred in deciding that, under the provisions of the will, the Sidon estate, in said will mentioned, descended, in fee simple, to the grand-children and great grand-child of the testator, with certain incumbrances.

Judge McDonald being related to a party in interest, did not preside in this cause.

WARD & OWENS; LLOYD & OWENS, and T. R. R. COBB, for plaintiff in error.

LAW & BARTOW, for defendants in error.

By the Court.—LUMPKIN, J. delivering the opinion.

[1.] The questions arising upon this record have been so soundly and satisfactorily treated by our brother FLEMING, that we are disposed to adopt his decision as the opinion of this Court, with some slight modifications.

And without pausing to examine, critically, the vast treasures of learning and authority adduced in this discussion, we submit this simple, common sense, and as we think, legal view of the case.

The testator gives the whole of his estate, real and personal, in perpetual trust, to his executors, as such, for the purposes therein mentioned. The income of the whole estate, is

devised and bequeathed to certain devisees and legatees, to-wit: his grand-children and great grand-child, subject to certain specific provisions. Many of these charges are legal and can be executed; others are illegal, because they require the estate to be kept together in perpetuity, and for other reasons; and consequently, cannot be carried out. This being the case, what is to be done? Does the whole will fail, and intestacy supervene? Surely not. The only result is, that the trust term will continue in the executors just so long as it may be necessary to accomplish the valid purposes of the will, and not a moment longer.

The testator gives his wife \$450 in cash, in lieu of her woman Lucy, whom he had sold, "because she was a supernumerary in his household, and naughty in her character." This sum was, of course, to be paid her immediately. the annuity left her by her former husband, he gives her an annuity of \$500, together with the choice of five servants, and the privilege of occupying any of the places of which he might die possessed, with an annual supply of provisions from his estate for the support of herself and household. bequests of the annuity and provisions, being a charge upon his whole estate, the whole must be kept together by the executors, for the purpose of raising the money and furnishing the provisions, unless some compromise arrangement can be be effected with the legatees. The annuity of \$500 left to his wife, ceases at her death; and then this sum is to be paid to certain named heirs of his deceased brother, Wm. Smith, each to receive \$100.

Next he gives Brighton in fee to his daughter, Mrs. Dunwoody; and should she survive his wife, all the privileges given to his wife are turned over to his daughter.

These bequests, therefore, require the trust to continue until the death of Mrs. Dunwoody, unless the same, as before intimated, can be otherwise accommodated.

Now two things are undeniable: First, that no perpetuity was needed to carry out these provisions. They terminate with two designated lives in being, to-wit: that of Mrs.

Smith and Mrs. Dunwoody. Secondly, That the whole of these dispositions being for the life only of his wife and daughter, are entirely consistent with the subsequent bequest of the fee, which the testator afterwards made to his lineal descendants. Has he made such bequest?

He first provides that all the lands owned by him at his death, within three miles of his Sidon estate, be considered as an appendage to said estate, with all the negroes thereon, and all others belonging to him at the time of his death, whether lent or hired out; and he declares that this shall constitute his general estate, to be kept in perpetuity. for the annual appropriation of all the annual income arising out of said estate, (those excepted in the provisions made for his wife and daughter during their lives, and to defray all necessary plantation expenses, and reserving, as he, afterwards does, certain appropriations for the negroes, a preacher and the repair of the chapel,) he directs that the whole of said yearly income be equally divided, share and share alike, between his three grand-sons, Wm. J., Dean M. and John F. Dunwoody, Mrs. J. A. Jones, Mary E. Dunwoody and his great grand-daughter, S. E. M. Shackelford.

Now we say that these devisees and legatees took a fee in the corpus of the "general estate," because the whole "annual income" is given to them and their heirs forever, viz: indefinitely and without limitation of time, and without any disposition over, of the capital, to any one else; and that the interest in the same vests absolutely and immediately, the possession only being postponed until the termination of the two life incumbrances charged thereon; and that inasmuch as the other charges or reservations, that is, the annual payment of \$5 to each slave, of \$100 to a preacher and the repairs to be done to the church, required a perpetuity to support them, they are illegal and fall to the ground; and that upon the death of Mrs. Smith and Mrs. Dunwoody, the whole estate vests, both in interest and possession, in the six designated devisees and legatees. If the whole income of the estate is given to them in fee, and there is no legitimate pur-

pose of the will which requires the executors to hold this estate in trust after the death of the life annuitants, is not this result inevitable? It is a familiar principle, that the trust term devised to executors, cannot continue so as to retain the legal estate in them a moment longer than is necessary to enable them to perform the objects of the trust, so far as the same are valid and can be carried into effect, according to the rules of law. For however long a period the estate may be nominally devised to them, by the terms of the will, whenever the legitimate purposes for which an express trust has been created ceases or has been accomplished, the estate of the trustees must terminate. Moreover, it is equally well settled, that although some of the objects for which a trust term has been created, may be invalid, if any of the purposes for which the trust is created are valid, the trust must continue in the executors so long as it is necessary to execute those which are legal. Authority need not be cited in support of these elementary doctrines; they commend themselves to the approval of every lawyer.

Our conclusion, then, upon this point is, that inasmuch as the principal and interest cannot be separated, both must be kept together in the executors, just so long as the will made it necessary to carry out the legitimate purposes of the will; yet, these being effectuated, the entire estate is transferred, by operation of law, eo instanti, to the six devisees and legatees of the testator.

Suppose the testator had said, I give the whole of my estate, real and personal, to my five grand-children and great grand-child, to them and their heirs forever; and had then directed the estate to be kept together by the executors for the purpose of paying annually, out of the rents, issues and profits thereof, the small charitable bequests contained in the will? The perpetuity clause, would, of course, be void, because contrary to the rules of law. But would the fee, previously given, be thereby defeated? Such a proposition will

not be seriously maintained. And yet this, to all intents and purposes, is the case before us.

To all this it is said, we admit the rule, that the gift of income is a gift of the principal; but that this is no arbitrary rule, adopted either from convenience or policy, but one founded in reason, which is, that such was the intention of the testator. And it is broadly asserted "that it is not in the power of a Court to adopt a rule by which to compel a testator to give more than he desires to give."

Grant that the reason here assigned for the rule is correctly stated, and that it is true, as insisted by Counsel for defendants in error, that the question of intention can only arise where there is doubt as to the quantity or duration of interest designed to be given; and admit further, what is undoubtedly true in point of fact, that the testator, Mr. Smith, did not intend that the corpus of this estate should ever come to the possession of the persons to whom the income is bequeathed, does it follow that the devisees and legatees could not take an absolute estate in the capital? And is it true, that it is not in the power of the Court to adopt a rule by which to compel a testator to give more than he desires to give?

What estate did Leonard Fretwell intend to give to Mary Fretwell, his daughter? (1 Kelly 97.) He said in his will. that he gave her an estate for the term of her natural life in the property therein mentioned. But the Courts adopted a rule by which they compelled the testator to give his said daughter an absolute fee in Lydia, Cloe, Lucy and Joe. much stronger that assumption of power which would convert an estate for life into a fee, than that which would, contrary to the intention of the testator, unite the corpus and income in the legatee! In the one case, it is a total change of the quantity of estate intended to be given: in the other, the estate devised is the same, and the dispositive scheme is altered only as to the mode of enjoyment. A father gives the whole of his estate to his daughter, provided she remains single; . and if she marries, then over to some other person. daughter marries, and yet retains the estate, contrary to the

express intention of the testator, the Courts holding that the will is contra libertatem matrimonii.

So long as a testator does not infringe the rules of law, he has a right to say, with Staberius, when he imposed an unpalatable condition in his will: Sive ego prave seu recte, hoe volui. But if he proposes doing an illegal act—as creating a perpetuity, or uses words to create one estate, when he designed another; in these and innumerable other cases which might be cited, his intentions will be defeated. How frequently are Courts obliged to say, in the construction of wills, in conflicts between intention and technical rules and expressions, voluit sed non discit.

And yet, after all in this case, no great violence is done to the intention of Mr. Smith. He intended his descendants to have the benefit of his estate; but from that pride so natural to man, or from some other motive, he was averse to see it divided and scattered. Hence, he directs it to be kept together by his executors; but this cannot be done. eloquently remarked by Chief Justice Crew, in the case of the Earldom of Oxford, (Sir W. Jones' R. 101,) "there must be an end of names and dignities and whatsoever is tenure." As the objects of his bounty, then, could not enjoy the estate in the mode selected by the testator, lawfully and consistently, his general intent is to be carried into effect. is important only that this should prevail. The quantity of interest is the same, with the immaterial deductions carved out of the income heretofore noticed. And the only change is, that the legatees will severally manage their own property, instead of paying others to do it for them.

It only remains to notice the emancipation clause. The testator directs, that after his decease, an annual register shall be kept of all the births occurring on the estate—a record to be made of the same; and that every tenth negro born, at the age of 18 years, shall be delivered over to the Colonization Society, provided they see fit to accept of this provision in his will; otherwise, they are to remain in slave-ry.

We concur with Judge Fleming in holding that this clause is void, because dependent upon the perpetuity section, which is, itself, void. But it is void for another reason. This testator having given these slaves absolutely to his grand-children and great grand-child, this direction for the manumission of one tenth of the future increase of these slaves, is repugnant to the rights of property in the legatees.

We know there are reported cases in the slave States, to the contrary of this. We believe, however, that they cannot be sustained on principle. For the law is positive, that conditions cannot be sustained, when they are repugnant to the estate granted, or infringe upon the essential enjoyment and independent rights of property, and tend manifestly to public inconvenience. This bequest is obvious to all these objections. The title to the mother of slaves, draws after it the title to the offspring. And a condition annexed to a conveyance in fee, or by devise, that the owner of female slaves, should set free every tenth child, is incompatible with the absolute rights appertaining to the estate in fee.

And what manifest inconvenience would result from any other doctrine? Slaves, like other personal property, pass without deed or writing. And what confusion would spring up, should it be held that subsequent vendees or donees, took the property saddled with this condition! Courts look with a hostile eye, upon all conditions and restraints upon the free and unincumbered exercise of the inherent rights of property; and let it not be said that the legatee voluntarily takes the property subject to the condition. So does the grantee, upon condition in his grant, that he shall not commit waste, nor his wife have dower in the estate conveyed. And yet, the law says, in all such cases, that the condition is repugnant and void; because unreasonable and in conflict with the nature of the estate conveyed.

The affection which prompted this will, is the most powerful principle implanted in the human breast. Indeed, the idea would be revolting to a savage, to take away the whole of this large estate from those who are descendants from the Phillips and another vs. Phillips and others.

testator's loins, and bestow one half of it upon his aged widow, on the brink of fourscore years, and who was but comparatively a short time the companion of the testator; and who, by the will of her two husbands, is abundantly provided for. These devisees and legatees were the principal objects of Mrs. Smith's regard, and had, of all other persons, the highest reason to expect his favor and bounty. He would have been justly chargeable with cruelty had he disappointed them. For, says Rutherforth in his justly celebrated Institutes on Natural Law, (p. 117,) "what we say of children in the first degree of descent, may likewise be applied to those of the second or third degree; that is, to a man's grand-children; for it is the duty of the remote parent, as the remote cause of their existence, to make their life easy and comfortable, and to show them all the kindness in his power."

While we disclaim, then, all intention of making a will for Mr. Smith or any other one else, we will, God and the law helping us, do all we can in this and every other case, to give that direction to property which is agreeable to the best feelings, affections and reasons of mankind.

No. 48.—MARK PHILLIPS and another, plaintiffs in error, vs J. PHILLIPS and others.

[1.] A testator gave all of his property to his wife for life, and then his will was as follows: "and after her death, the property bequeathed to her is to become the property of my well beloved children, as follows, to-wit: unto my beloved son Sherwood, I give and bequeath two certain named negroes, Poll and Moll," &c.: Held, that Sherwood's remainder in these negroes vested in him at the time of the testator's death.

In Equity, in Montgomery Superior Court. Decision on demurrer, by Judge Holt, April Term, 1855.

Phillips and another vs. Phillips and others.

Rial B. Phillips, by his will, gave all of his property, real and personal, to his wife, during her natural life; "and after her death, the property bequeathed to her is to become the property of my well beloved children, as follows, to-wit: unto my well beloved son Sherwood, I give and bequeath two certain negroes, named Poll and Moll." Similar clauses disposed of the other negroes to other children. The residuary clause gave and bequeathed all his personal property and lands to his four sons, to be equally divided between them.

Testator died in 1834; his widow died in 1853. In the meantime, several of the negroes had increase. Mark and Micajah Phillips, two of the sons, filed their bill, claiming that the increase passed under the residuary clause, and did not go to the remainder-men. Upon demurrer, the Court dismissed the bill, and this decision is assigned as error.

W. B. GAULDEN, for plaintiffs in error.

SHEWMAKE, for defendants in error.

By the Court.—Benning, J. delivering the opinion.

[1.] The question in this case depends upon the question, whether the remainders vested in the remainder-men, at the death of the testator? If they did, it was not disputed that the "increase" of the remainder-negroes went with those negroes; and so, could not pass under the residuary clause. This was the clause under which the complainants claimed.

In Boraston's case, which, in principle, was not unlike this, the decision was, that the remainder vested at the death of the testator.

That case, as correctly stated in Roper on Legacies, was as follows: "the devise was to a man and his wife for eight years; and after that term, the lands were to remain to the executors of the devisor, until such time as Hugh Boraston should accomplish his full age of twenty-one—the mesne profits to be employed by the executors towards the perform-

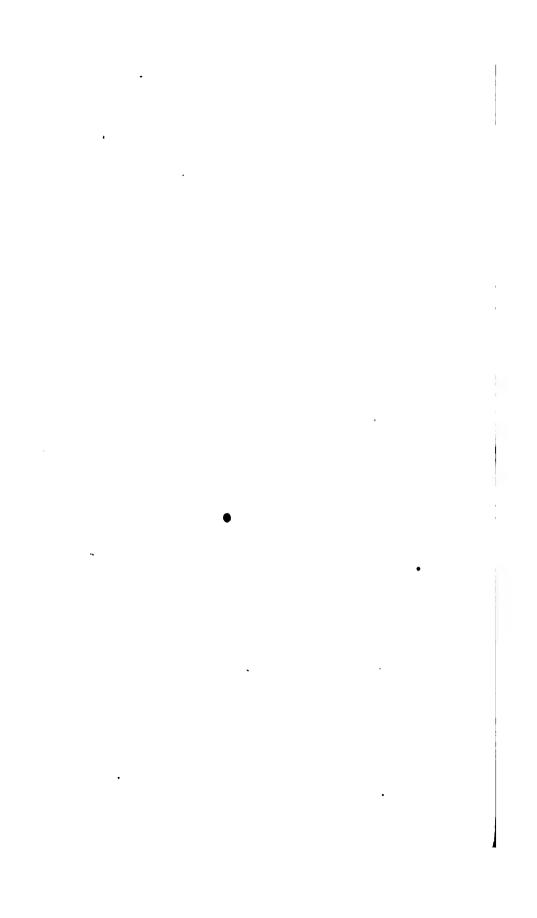
Phillips and another vs. Phillips and others.

ance of the testator's will; and when the legatee should attain twenty-one, then that he should enjoy the estate to him and his heirs. Hugh Boraston died under twenty-one, and the Court of King's Bench determined that the remainder vested in him at the death of the devisor, with a postponement of the enjoyment until Hugh completed the age of twenty-one." (1 Rop. Leg. 393. 3 Coke, 19.)

This case has been followed by a great number of others, which may be found stated in 1 Rop. Leg. 393, et seq.; Jarm. Wills, 734, et seq.; Cruise's Dig. Tit. XVI. Remainder, ch. 1, s. 75, et seq.

See, too, Holcombe vs. Tuffts and another, (7 Ga. R. 535.) We think, therefore, that the remainders in this case were remainders which vested in the remainder-men at the death of the testator.

Consequently, we must affirm the judgment of the Court below.



CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF THE STATE OF GEORGIA.

AT MACON,

JANUARY TERM, 1856.

Present—JOSEPH H. LUMPKIN, HENRY L. BENNING, CHAS. J. McDONALD.

No. 49—Thomas Swearingen, plaintiff in error, vs. Nancy Swearingen, defendant in error.

- [1.] To entitle the plaintiff in divorce to temporary alimony, two things are necessary—marriage and the pendency of a suit; and upon the application for an allowance, should the bona fides of the proceeding be questioned, it is for the Court to decide, in the first instance, the matter.
- [2.] The Court, in its inquiry as to the authority to sue, will not be restricted to strictly legal testimony; but may satisfy its conscience by the statements of even interested persons.
- [3.] This Court will not control the discretion of the Circuit Court in allowing temporary alimony, unless it has been flagrantly abused.
- [4.] Temporary alimony may be granted so as to relate back to the commencement of the suit.
- [5.] The defendant may plead and prove on the trial, that the libel was brought by others, without the knowledge or consent of the wife, understandingly given; and it will constitute a good bas to the recovery.

VOL XIX-34

Swearingen vs. Swearingen.

Application for temporary alimony, in Baker Superior Court. Decision by Judge Perkins, November Term, 1855.

Thomas Swearingen alleged, in reply to a motion for alimony, that the libel for divorce was filed without the knowledge or consent of the libellant. An issue was joined on this allegation. Defendant demanded a Jury to try the same, which being refused, is assigned as error. Libellant offered as witnesses, two of the sons-in-law of the parties; objection, that they were interested; over-ruled by the Court, and assigned as error.

It was proved that libellant was old and afflicted with chronic rheumatism; that it required a considerable quantity of morphine for her comfort; that defendant was worth about \$15000. Thomas Swearingen, a married son, on oath, offered to board, &c. libellant for \$20 per month. The Court allowed her \$40 per month for alimony, and \$250 for Counsel fees.

This is assigned as erroneous, on the ground that it was excessive.

Bower, for plaintiff in error.

WARREN & WARREN, for defendant in error.

By the Court.—LUMPKIN, J. delivering the opinion.

[1.] The first error assigned is, that the fact should have been submitted to a Jury, to find as to whether or not this action was brought by the plaintiff?

To entitle the libellant to temporary alimony, two things are necessary: marriage and a suit for divorce. Ordinarily, no inquiry is made as to the authority of Counsel to bring the action. Attorneys are sworn officers of the Court; and as such, amenable for professional misconduct. Their character is usually a sufficient guaranty that they are not barra-

Swearingen rs. Swearingen.

- tors. But some suspicion having been cast upon the bona fides of this proceeding, we directed, when this case was up before, that some preliminary inquiry should be made upon this subject. We are satisfied, however, that upon a motion for temporary alimony, that it is competent for the Court to decide the matter, so far, at least, as to enable it to award an appropriation. To make up an issue to be submitted to and passed upon by a Jury, would require funds to employ professional aid, which the feme covert does not possess. It would defeat the very end for which this application is made.
- [2.] Were the Knowles's, the sons-in-law of the parties, competent to testify? We concede that they are interested in the event of this litigation; for if the suit is successful, the law is imperative, that the Jury shall give the property to the children, unless they see fit to appropriate a part of it to one or both of the parents. (Cobb's Digest, 225.) Still, we hold, there was no impropriety in the Court's taking the statements of these witnesses as it might have done of the wife herself, to show that this was her suit.
- [3.] Was the allowance excessive? It must be admitted that it was pretty liberal, considering the income of the husband. Yet, it is not so flagrantly extravagant as to compel us to control the discretion of the Judge who granted it.
- [4.] Was it error in the Court to make the allowance of alimony, to relate back to the commencement of the suit? We see no objection to this. It is usual and proper in such cases.
- [5.] In conclusion, we say that it is the privilege of the defendant to plead in bar of the plaintiff's right to recover, that this libel has been prosecuted at the instance of the children, or a portion of them, without the consent and against the wish of the wife. And upon that issue, disinterested testimony alone should be received. If Mrs. Swearingen is unable to be brought to Court, and it is inconvenient for the presiding Judge to examine her personally, he should appoint two or more fit and proper persons, whose character are

Porter vs. Pierce.

above suspicion, and who stand indifferent toward the parties, to ascertain and report to the Court and Jury, whether or not the wife desires to be totally divorced from her husband? And should it be clearly established that she does, with a full understanding of the consequences, Counsel will take pleasure, no doubt, so to shape the verdict as to do equal justice to parents and children, in the disposition of the property. The defendant may not be without fault; nevertheless, in the severe and long protracted affliction of his wife, he has been visited by a great misfortune. He should not be stripped of the earnings of his labor for life, and turned out penniless upon the world, in his old age. I speak as man.

No. 50.—Drury Porter, plaintiff in error, vs. ELIJAH PIERCE, defendant in error.

[1.] To a Sheriff who fails to execute a ca. sa. it is no excuse that the defendant in ca. sa. has been already arrested under another ca. sa. and has given a bond, &c. for his appearance, to take the benefit of the Honest Debtors' Act.

Rule vs. Sheriff, in Baker Superior Court. Decided by Judge Perkins, November Term, 1855.

This rule was taken against the Sheriff, to show cause why he had not arrested James D. Hampton, under a ca. sa. in favor of Drury Porter. The Sheriff responded that Hampton had been previously arrested under another ca. sa. and had given bond for his appearance at Baker Superior Court, to take the benefit of the Honest Debtors' Act, and that the plaintiff in the second ca. sa. had been notified as a creditor.

Porter vs. Pierce.

The Court discharged the rule, and this decision is assigned as error.

Lyon, for plaintiff in error.

STROZIER, for defendant in error.

By the Court.—Benning, J. delivering the opinion.

[1.] The question is, whether it is an excuse to a Sheriff for the failure to execute a ca. sa. that he has already executed another ca. sa. against the same defendant, but in favor of another plaintiff, and that on executing that ca. sa. the defendant gave him a bond to appear at Court and take the benefit of the Honest Debtors' Act, and notified the plaintiff in the non-executed ca. sa. of his intention to take the benefit of the Act.

And we think that it is not. The plain command which a ca. sa. gives to a Sheriff is, that he arrest the defendant in the ca. sa. It is his duty to obey this command, if he can. That the defendant has been arrested under one ca. sa. and has given a bond to appear in Court and take the benefit of the Honest Debtors' Act, under that arrest, does not exempt him from arrest under another ca. sa.

And reasons are obvious, why it ought not to exempt him. The arresting creditor may compromise or abandon his suit. If he does either, of what use to any other creditor, would be the notice?

And property may come to the hands of the debtor, after he has been arrested and has filed his schedule. A new arrest would compel him to put this property in the new schedule which, by a new arrest, he would have to file. Thus, the existence of such property, would be found out.

There is no question made in this case, as to what degree of punishment the Court ought to inflict on a Sheriff for failing to arrest a person who is insolvent; whether it ought to Horn, adm'r, &c. vs. Thomas, adm'r, &c.

make him pay the debt, or less than the debt, or ought to imprison him? And of course no such question is decided.

In Howard vs. Crawford, Gov. (15 Ga. 422,) the case was an action on the Sheriff's bond against the sureties. And the decision of this Court amounted to this: that the measure of damages was what would be compensation for the real injury, or rather loss, sustained by the creditor.

We think this case was one in which the rule ought to have been made absolute against the Sheriff; and then, that he should not have been discharged from the contempt until he had been made to suffer punishment to some extent.

- No. 51.—CHARLES W. HORN, administrator, &c. plaintiff in error, vs. Francis Thomas, administrator, &c. defendant in error.
- [1.] Where the allegations which constitute the gravamen of the bill are answered vaguely and indefinitely, the injunction will not be dissolved.
- [2.] Where, from the whole pleadings in the case, the Court is satisfied that all the facts which are necessary to a proper understanding and decision of the cause are not out, the injunction will be retained till the hearing.
- Motion to dissolve injunction, in Dougherty Superior Court, decision by Judge Perkins, December 1st, 1855.

Charles W. Horn, as administrator of Wm. L. Hampton, deceased, filed a bill against Francis Thomas, as administrator of John M. Hampton and Andrew Y. Hampton, charging as follows:

That on 12th January, 1849, Andrew Y. Hampton, as principal, and Wm. L. Hampton, as surety, made and delivered to F. Thomas, as administrator of John M. Hampton, fifty-four promissory notes, amounting to \$1588 65, being

Horn, adm'r, &c. vs. Thomas, adm'r, &c.

given for the purchase of property at the sale of said administrator; that subsequently, in November, 1854, Andrew Y. Hampton recovered of Thomas, as administrator, a decree for \$2500, with interest from 1st April, 1841; that at no time did said administrator attempt to plead these notes as a set-off to this claim, but that there was a private understanding between these litigants, that the notes were not to be pressed till the termination of this case. When the decree was obtained, instead of paying off the same pro tanto with these notes, the said Thomas, as administrator, turned over to Andrew Y. Hampton a large amount of choses in action, in discharge of the decree, which arrangement complainant charged was a discharge of his intestate as surety. Among the assets turned over to pay this decree, was a note on Mrs. Ann Jane Hampton, now Mrs. Lunday, for \$5.000; that Andrew Y. Hampton received from Robert Lunday, in part payment of this note, a fi. fa. in favor of Samuel Yopp against John M. Hampton, the intestate of Thomas, as principal, and James D. Hampton as security, dated June, 1848, for \$1515, principal, with interest and cost, which judgment and fi. fa. Andrew Y. Hampton now controls against said estate; that it was the oldest lien and of the highest dignity against said estate; that the administrator has paid off other debts, of inferior dignity, to a greater amount than this judgment, and that this judgment is a good set-off against these notes; that the said Francis Thomas, in his individual right, in June, 1855, commenced suit against complainant as the administrator of Wm. L. Hampton, upon all of these notes, which suits were still pending; that Andrew Y. Hampton is now wholly and totally insolvent. The prayer was for an injunction and a set-off of the judgment against these notes, and a release of complainant's intestate as surety.

The answer of Francis Thomas admitted the taking of the notes and the decree recovered by Andrew Y. Hampton; also, the turning over of assets to pay the same, especially the note of Mrs. Ann Jane Hampton, but utterly denied that there was ever any agreement for indulgence or delay in

Horn, adm'r, &c. vs. Thomas, adm'r, &c.

suing on the fifty-four notes. Defendant did not plead these notes as a set-off, because there was no mutuality in the debts; nor were these notes the property of the estate at the time of the rendition of the decree, defendant having paid off debts of the estate more than equal to this amount, and more than the assets which have come into his hands. Defendant denied paying debts of inferior dignity, but insisted the debts paid were for trust funds, and stood on a higher ground than the fi. fa. and judgment alluded to; others were costs and lawyer's fees, for defending the estate. Defendant insisted that Andrew Y. Hampton was not the owner of the fi. fa. but had transferred the same to one Sheftall, and that he was not aware of his insolvency when the Equity suit was pending.

On the coming in of this answer, on motion, the Court dissolved the injunction. This decision is assigned as error.

STROZIER & SLAUGHTER, for plaintiff.

Lyon, for defendant.

By the Court.—LUMPKIN, J. delivering the opinion.

[1.] Upon the whole, we are inclined to the opinion, and so adjudicate, that it is better that the injunction should be retained till the hearing.

The gravamen of the bill, is the mal-administration of the assets of John Hampton's estate, by Francis Thomas. The denial of this charge is not fully made by the answer. It was in the power of the defendant to have stated, more definitely, what debts were paid and the grade of each; what amount of the debts, and which inventoried as due the intestate, were lost and uncollectable by reason of sets-off, payment, &c. The answer is too vague, general and indefinite, in these and other respects.

If the judgment transferred by Lunday to Andrew Hampton, ought to have been satisfied out of the estate, in Equity as well as at Law, it is still due, and should be allowed to

Horn, adm'r, &c. vs. Thomas, adm r, &c.

set-off the notes sued on; for Andrew Hampton holds this demand through his sister, to whom it was owing, and who cannot be affected by the proceedings in the Equity cause between Andrew Hampton and Francis Thomas.

[2.] There are facts in this case which require explanation. No satisfactory reason is assigned why these notes were not collected sooner. Suppose they had, as it is argued, become the private property of Thomas, on account of his advances in behalf of the estate of his deceased brother, is that a good excuse why they were not retained out of the \$5.000 turned over by Thomas to Hampton? According to the usual dealings and course of business between men, it is not. Why is it that Andrew Hampton took the judgment from his sister's husband against his brother John, in part payment of her note, which was the same as cash, if it was not understood by all the parties that the judgment was good? For what purpose did he take this judgment at all, if not to rebut against his notes?

The fact that the amount of this judgment was thus taken as cash by Andrew Hampton; that no effort was made to coerce its payment; that it corresponds, in size, with the notes upon which he is sued as principal, and the estate of his dead brother as security, is suggestive of doubts as to the bona fides of this proceeding, to say the least of it, and to create a strong suspicion that the whole of this case is not out. After waiting so patiently for six years, the creditor can hardly complain of a little longer delay; whereas, Andrew Hampton being insolvent, the dissolution of the injunction might work irreparable detriment to the security.

The position was assumed by Counsel for Horn, that admitting that Thomas had paid judgment debts of his intestate with his own money, he is not thereby subrogated to the dignity of the debts so discharged, but becomes a simple contract creditor only for the amount so discharged. Of necessity, this must be wrong; for in accounting with the administrator, for his disbursement of the assets, you must, of

Collier et al. vs. Stoddard.

course, look to the grade of the debts which he has paid; and if he has complied with the Statute, as to priority of payments, he will be protected, of course.

No. 52.—N. W. Collier and others, plaintiffs in error, vs. EZEKIEL STODDARD, defendant in error.

[1.] Nothing but a breach of official duty, is a breach of a Sheriff's bond.

Baker Superior Court. Tried before Judge PER-Debt. KINS, November Term, 1855.

This was an action upon a Sheriff's bond, for failure to make the money upon a fi. fa. in favor of E. B. Stoddard vs. Wilson & Mathis. Upon the trial, the following letter was given in evidence:

Knoxville, Ga. Jan. 10th, 1841.

Dear Sir:

We have received Five Hundred and Thirty Dollars of the executions, Ezekiel B. Stoddard vs. Wilson & Mathis, and we give Thomas Howard of your county control of the execution. We will be obliged to you if you will make a calculation of the balance due on the executions, of principal and interest, protest fees and costs, and take Mr. Howard's note, payable by first day of January next, and keep it till we see you. We will satisfy you for your trouble and see your cost paid when we meet with you.

Respectfully, ROBERT HARDIE,

MACON & MAY,

Plaintiff's Attorney.

Sheriff of Baker.

Collier et al. vs. Stoddard.

Defendant's Counsel requested the Court to charge, among other things—

That if Hardie undertook the performance of any duty outside of his office, his failure to comply with his undertaking, does not make his securities liable on his bond; and instructions from plaintiff to perform duties not incumbent on him as Sheriff, may or may not be obeyed; but a failure to obey will not make him liable.

The Court declined so to charge, but did charge as follows:

That Macon & May's letter was a letter of instructions; and if they were satisfied that Hardie took Howard's note and turned it over to plaintiff's Attorney, then the sureties were discharged; otherwise, they were not, and that the onus was on the defendants to show this fact.

To this charge and refusal to charge, defendants excepted. Other exceptions were filed, but these controlled the case.

MORGAN, for plaintiffs in error.

LYON & CLARK, for defendant in error.

By the Court.—Benning, J. delivering the opinion.

[1.] Was the charge right?

The condition of a Sheriff's bend is, that he shall perform the duties which belong to his office of Sheriff. Nothing is a breach of this condition, except a failure by him to perform some one or more of these official duties.

With respect to a fi. fa. placed in the Sheriff's hands, his official duty is to do what the fi. fa. commands him to do, and that only, viz: to collect the money which the fi. fa. requires him to collect, and in the manner which the fi. fa. specifies. To act as agent for the plaintiff in the transfer of the fi. fa. to some third person, is what the fi. fa. does not command him to do. If, therefore, he undertakes to do that

Collier et al. vs. Stoddard.

and fails to keep his undertaking, it is no breach of his official bond.

But although this is the duty of a Sheriff, with respect to a f. fa. put in his hands, yet, if the Attorneys for the plaintiff in f. fa. tell him that they have given the control of the f. fa. to another person than the plaintiff in it, and that they will thank him to compute the amount due on the f. fa. and take that person's note for it, this amounts to instructions to the Sheriff to desist from executing the f. fa. It amounts, at least, to saying to him to do nothing with the f. fa. for the plaintiff in it, until he receives further instructions.

If, therefore, the Sheriff, after receiving such instructions, desist from executing the fi. fa. he does not violate his official duty.

Consequently, such desisting is no breach of the bond of him and his sureties.

If, however, the Sheriff gets a countermand of the instructions, to desist from executing the fi. fa. it of course becomes his duty, at once, to resume executing it.

If these positions are correct, as we think they are, the charge of the Court was not right; for that charge made the exemption from liability, on the part of the sureties, depend on whether the Sheriff had, as requested by the plaintiffs' Attorneys, taken Howard's note; i. e. on whether the Sheriff had helped to negotiate the fi. fa. to Howard. It was no part of the Sheriff's official duty to help do this.

We think the charge should rather have been, that the letter of the Attorneys for the plaintiffs in fi. fa. amounted to instructions to the Sheriff to desist from executing the fi. fa. for the benefit of the plaintiff in fi. fa.; and that the Sheriff was not bound to resume the work of executing it until those instructions had been withdrawn; and that whether the instructions had been withdrawn or not, was a question to be decided by the Jury from the evidence.

We think, therefore, that a new trial ought to be granted, and granted on this ground, viz: that the charge of the Court was not right. Callaway, adm'r, &c. os. Jones & Quattlebum.

And this is the ground on which two of the Court, Judge LUMPKIN and myself, put the judgment granting a new trial in this case, when it was up before. The Court was unanimous in that judgment, but Judge STARNE'S reason for thinking the judgment right was, that the evidence did not authorize the verdict; the reason of the other two members of the Court was, that the charge to the Jury was wrong. (See 17 Ga. 228.)

2d. As to the ground in the motion for a new trial, that the verdict was contrary to the evidence, we merely say, that in our opinion, there was evidence on both sides of the case. The main question in the case was, whether the Sheriff had, after receiving the letter of the Attorneys for the plaintiffs, been ordered by them to resume the work of executing the f. fa.; and there were facts in proof from which the Jury might, on this question, make opposite inferences.

In Equity, in Sumpter Superior Court. Decision by Judge Perkins, August Term, 1855.

This bill was filed by William P. Gammage, in his lifetime,

No. 53.—WILLIAM CALLAWAY, administrator of W. P. Gammage, plaintiff in error, vs. Jones & QUATTLEBUM, defendants in error.

^[1.] Where the answer to a charge in a bill is a mere matter of opinion, a denial, founded upon belief only, does not swear off the equity, so as to entitle the defendant to a dissolution of the injunction.

^[2.] A general warranty of soundness may cover even patent defects.

^[3] Where the Court gets jurisdiction of the person or property of a non-resident, it will retain it to administer justice to its own citizens, and will not send them to a foreign jurisdiction to seek relief.

Callaway, adm'r, &c. vs. Jones & Quattlebum.

alleging that Jones & Quattlebum, in December, 1850, sold to complainant two negroes—Tenah and Rachel, for the sum of \$1100, and gave a written warranty of soundness; that complainant gave them a mortgage upon the negroes for the purchase money, and has paid them a portion of the same; that they had foreclosed the mortgage for the balance, \$675, besides interest, and were proceeding with the fi. fa.; that both of the negroes were unsound, Tenah having a disease of the womb, and Rachel having a defect in one of her eyes; and that the amount already paid was the full value of the negroes; that defendants resided in the State of South Carolina. The prayer was for an injunction.

The defendants' answer denied that Tenah had any disease of the womb, or was unsound—admitted the defect in Rachel's eye, but insisted it was a patent defect, and not covered by the warranty.

The Court, on motion, dissolved the injunction, and this decision is assigned as error.

Brown & Brown, for plaintiff in error.

MILLER & HALL, for defendants in error.

By the Court.—LUMPKIN, J. delivering the opinion.

The judgment of this Court is, that the injunction in this case should not have been dissolved, the answer not having sworn off the equity of the bill.

[1.] As to the womb disease alleged to have existed in one of the women at the time of the sale, the denial is, and of necessity must be, a mere matter of opinion—no disease is more subtle; none effects the whole system so completely; and consequently, none is more difficult to detect. And as to the the defect in the eye, of the other woman, while the fact is admitted, it is insisted, that the blemish was obvious, and was not, therefore, covered by the general warranty of soundness.

[2.] That there are numerous elementary dicta, as well as reported cases, in favor of this proposition, we do not dispute. We believe, however, that principle and the weight of authority, are the other way. (1 Parson's on Contracts, 459, note.) A purchaser chooses to rely upon the warranty of the vendor, rather than his own judgment; and if so, he should have the benefit of the protection which it gives him. 1. [3.] But it is argued, that the vendee has ample remedy at Law, by following the vendor to South Carolina. But the doctrine is, that when the Courts get jurisdiction of the person or property of non-residents, they will retain it, to administer justice to its own citizens, and not send them to a foreign jurisdiction to seek redress; and this not considered a violation of the comity of States. And if this be true generally, how much more strongly does it apply in the present case? Who would venture to assail one of the clan of the Quattlebums of historical notoriety in our chivalric sister State, with the significant device on her eschutcheon, animis opibusque parati.

- No. 54.—SEABORN JONES and WILLIAM ALFORD, plaintiffs in error, vs. Paul E. Tarver, defendant in error.
- [1.] Where a deed is executed under a power of Attorney, a mere mis-recital of the power in the deed, is no objection to the latter, if it appears that power was sufficient to authorize the execution of such a deed.
- [2.] The Statute does not prescribe the form of the Sheriff's return of service; and when the return does not show that the service was not legal, it will be presumed to be fair and legal.
- [3.] The Act of 1823, usually known as the Dormant Judgment Act, does not apply to judgments obtained prior to the 19th December, 1822.
- [4.] The decisions of a Court of competent jurisdiction, as to the matter before it, are to be presumed to be well founded and its judgments regular.

Callaway, adm'r, &c. vs. Jones & Quattlebum.

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Brown & Brown, for plaintiff in error.

MILLER & HALL, for defendants in error.

By the Court.-LUMPKIN, J. delivering the opinion.

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- No. 54.—SEABORN JONES and WILLIAM ALFORD, plaintiffs in error, vs. Paul E. Tarver, defendant in error.
- [1.] Where a deed is executed under a power of Amorney, a mere mis-recital of the power in the deed, is no objection to the latter, if it appears that power was sufficient to authorize the execution of such a deed.
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Callaway, adm'r, &c. vs. Jones & Quattlebum.

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[2.] That there are numerous elementary dicta, as well as reported cases, in favor of this proposition, we do not dispute. We believe, however, that principle and the weight of authority, are the other way. (1 Parson's on Contracts, 459, note.) A purchaser chooses to rely upon the warranty of the vendor, rather than his own judgment; and if so, he should have the benefit of the protection which it gives him. 1 [3.] But it is argued, that the vendee has ample remedy at Law, by following the vendor to South Carolina. But the doctrine is, that when the Courts get jurisdiction of the person or property of non-residents, they will retain it, to administer justice to its own citizens, and not send them to a foreign jurisdiction to seek redress; and this not considered a violation of the comity of States. And if this be true generally, how much more strongly does it apply in the present case? Who would venture to assail one of the clan of the Quattlebums of historical notoriety in our chivalric sister State, with the significant device on her eschutcheon, animis opibusque parati.

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The Court, on motion, dissolved the injunction, and this decision is assigned as error.

Brown & Brown, for plaintiff in error.

MILLER & HALL, for defendants in error.

By the Court.—LUMPKIN, J. delivering the opinion.

The judgment of this Court is, that the injunction in this case should not have been dissolved, the answer not having sworn off the equity of the bill.

[1.] As to the womb disease alleged to have existed in one of the women at the time of the sale, the denial is, and of necessity must be, a mere matter of opinion—no disease is more subtle; none effects the whole system so completely; and consequently, none is more difficult to detect. And as to the the defect in the eye, of the other woman, while the fact is admitted, it is insisted, that the blemish was obvious, and was not, therefore, covered by the general warranty of soundness.

[2.] That there are numerous elementary dicta, as well as reported cases, in favor of this proposition, we do not dispute. We believe, however, that principle and the weight of authority, are the other way. (1 Parson's on Contracts, 459, note.) A purchaser chooses to rely upon the warranty of the vendor, rather than his own judgment; and if so, he should have the benefit of the protection which it gives him. [3.] But it is argued, that the vendee has ample remedy at Law, by following the vendor to South Carolina. But the doctrine is, that when the Courts get jurisdiction of the person or property of non-residents, they will retain it, to administer justice to its own citizens, and not send them to a foreign jurisdiction to seek redress; and this not considered a violation of the comity of States. And if this be true generally, how much more strongly does it apply in the present case? Who would venture to assail one of the clan of the Quattlebums of historical notoriety in our chivalric sister State, with the significant device on her eschutcheon, animis opibusque parati.

- No. 54.—Seaborn Jones and William Alford, plaintiffs in error, vs. Paul E. Tarver, defendant in error.
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- [3.] The Act of 1823, usually known as the Dormant Judgment Act, does not apply to judgments obtained prior to the 19th December, 1822.
- [4.] The decisions of a Court of competent jurisdiction, as to the matter before it, are to be presumed to be well founded and its judgments regular.

[5.] Evidence pertinent to the issue in the Court below, is admissible.

[6.] Under the evidence in this case, it was not error in the Court to charge the Jury, that if they should be satisfied, from the evidence, &c. that the lessor of the plaintiff was dead, they should find for the defendant.

Ejectment, in Dougherty Superior Court. Tried before Judge Perkins, November Term, 1855.

On the trial of this case, the defendant below, Paul E. Tarver, offered in evidence a deed from one John G. Coleman to T. J. Johnson, executed by Thomas Coleman, as Attorney in fact, which deed recited that Thomas Coleman was appointed Attorney in fact, to execute a deed to Johnson. He also offered letters of Attorney from John G. Coleman to Thomas Coleman, giving general power to sell and convey this lot of land. To these papers plaintiff objected, on the ground that the general letters did not sustain the deed. The Court over-ruled the objection, and plaintiff excepted.

The defendant then offered in evidence a deed from Gunnerson, Sheriff of Baker County, to John G. Coleman, and an exemplification of the record of a judgment in Hancock Superior Court, in favor of Johnson vs. Gore & Alford (the drawer and lessor of plaintiff.) Also, a fi. fa. purporting to be an established copy, and the order establishing the same.

To these papers plaintiffs' Counsel objected-

1st. Because the exemplification showed that no legal service had ever been made on the defendant.

(On this point the entry by the Sheriff was, "Copies left at the house of defendant.")

2d. Because the said judgment and execution was dormant.

(On this point, the judgment was rendered in 1820. The copy fi. fa. was established in 1845, without any entries except "nulla bona," in 1820. The levy on the land was in 1846.)

3d. The judgment was presumptively paid off, from the lapse of twenty years.

4th. Presumption of satisfaction of the fi. fa. from lapse of time.

5th. This presumption could be rebutted only by regular proceeding by eci. fa.

6th. The fi. fa. was illegal and void, being an alias fi. fa. which the Court had no right to issue.

(On this point the order showed that this second fi. fa. was issued in lieu of the original, which was lost.)

7th. The order for issuing this f. fa. was void, because the Court had no authority to issue a second f. fa. and because notice was not given to defendants in f. fa. and because the record showed there was no evidence of loss of original, but the affidavit of the party.

8th. Because the Sheriff's sale under this void fi. fa. was itself null and void.

The Court over-ruled all of the objections, and admitted the evidence. To this decision plaintiffs excepted.

Defendants then offered in evidence the testimony of sundry witnesses, to show that William Alford, one of the lessors of plaintiff, (and the only one in whom they proved title,) had been absent from Hancock County, (where he formerly resided,) and had not been heard from for twenty or twenty-five years, and was insolvent when he left. Plaintiff objected to this testimony as irrelevant. The Court admitted it, and plaintiff excepted.

The Court charged the Jury, that if they were satisfied, from the evidence, that plaintiff, Alford, was dead, then they must find for defendant. To this charge plaintiffs excepted.

On these exceptions error is assigned.

Judge Benning, being related to one of the parties, did not preside in this case.

R. F. Lyon, for plaintiffs.

VASON; BOWER, for defendant. vol xix-36

By the Court.—McDonald, J. delivering the opinion.

This was an action of ejectment for the recovery of a tract of land lying in the County of Baker. After the plaintiff had closed his case, the defendant offered in evidence, as one of his muniments of title, a power of Attorney executed by John G. Coleman to Thomas Coleman, dated 18th day of December, 1850, authorizing him to sell and convey the land in controversy, and a deed, reciting a power of Attorney, of same date, executed by Thomas Coleman, as agent of John G. Coleman, to Thomas J. Johnson, conveying the same land. The deed bears date 10th January, 1850, and recites, further, that the power of Attorney authorized the agent to convev to Thomas J. Johnson. Both power of Attorney and deed, were objected to, on the ground that the power of Attorney offered in evidence was a general one, and that recited in the deed was a special one. The objection was over-ruled. and this ruling of the Court is made the first ground of exception.

[1.] There was, no doubt, a mis-recital of the terms of the power in the deed. But the date of the power and the date stated in the recital, are the same. A power to sell and convey, generally, is a good power to convey to Johnson; or rather, the conveyance to Johnson is a good execution of the power to sell and convey, generally. The recital of the authority is no part of the deed. The power of Attorney offered in evidence, was made in Hancock County; and it is recited in the deed to have been made in Hancock County. The objection was properly over-ruled.

The defendant next offered in evidence a deed from the Sheriff of the County of Baker, conveying the land under a sale, as the property of William Alford; and with it, he tendered an exemplification from the records of Hancock Superior Court, showing the judgment and the entire proceedings of the Court prior thereto, together with the copy fi. fa. under which the land was sold, established at October Term,

1845, of said Court, in lieu of the original, which had been lost, and the order of the Court directing it to be issued. The plaintiffs' Counsel objected to the evidence on several grounds.

[2.] The objection to the legality of the service of the declaration on the defendants, cannot be sustained. The Statute defines what shall be a good service of process, but prescribes no form for the Sheriff's return of service. The Sheriff's return shows that he had left copies "at the house of the defendants."

He is a sworn officer, and it will not be presumed that, contrary to his duty, he left copies at house of defendants, not their notorious places of abode. The presumption of law is in favor of a fair and legal service.

[3.] The judgment and execution were not dormant. The Dormant Judgment Act does not apply to judgments obtained prior to the 19th December, 1822. This judgment was rendered on the 15th April, 1820.

If it was dormant, then it must have been by the operation of some law before the Act of 1823. According to the practice as it is understood to have prevailed in Georgia, prior to the year 1812, if an execution was not sued out within a year and a day from the signing of the judgment, and there was no sufficient cause for the delay, the judgment must have been revived by scire facias before an execution could issue. The rule in England, however, was different when an execution had been issued; for if the writ of execution was issued, but not executed within the year and a day, but returned within the year, continuances might have been entered upon the roll, from term to term, to the time of the execution, which might have been at any time after the year, and as good as if the judgment had been revived by scire facias. (1 Seller's Prac. 515.)

This last mentioned rule, in regard to executions, was abolished by the Judiciary Act of 1799, re-enacted in 1811. (Cobb's New Digest, 510.) That Act declares, that "executions shall be of full force until satisfied, without the same being obliged to be renewed on the Court roll, from year to

year, as theretofore practiced." The judgment in this case, was entered up on the 15th April, 1820, and the execution was returned "nulla bona," on the 20th of August of the same year. Hence, the execution not being subject to the Act of 1823, and not having been satisfied, was of full force. It is insisted that the judgment was dormant. The Judiciary Act of 1798, being silent in respect to judgments on which no execution should issue, it was held, as hereinbefore stated, that after a year and a day, they must be revived by scire facias, before an execution could be issued on them.

This construction of that Statute led to the Act of 1812, which declares, that no part of the Judiciary Laws of this State shall be so construed as to require the renewal of any judgment as heretofore practiced, or in any other manner whatever. Hence, all judgments to which the provisions of the Act of 1823 do not apply, must be good and valid indefinitely, unless satisfied. If the renewal of a judgment cannot be required "in any manner whatever," no laches can be imputed to the plaintiff for failing to renew.

It is due to my learned brother (LUMPKIN) who presides with me in this case, to say, that while he does not dissent from the views here presented, he has some doubts in regard to them.

- [4.] I proceed, now, however, to a reason for admitting the evidence in which we fully concur. The whole of the matters which constitute the grounds of the plaintiffs' objection to the execution and judgment as evidence, have been adjudicated by the Superior Court of Hancock County. The original cause was tried then, and at October Term, 1845, the writ of fieri facias, under which the land was sold, was ordered to be issued, in lieu of one that had been lost. The Court was one of competent jurisdiction, and its decisions are to be presumed to be well founded, and its judgment regular. These reasons apply to and dispose of all the objections to the admissibility of the exemplification as evidence, and also of the deed which depended on them.
 - [5.] The testimony of the witnesses objected to, was pro-

White et al. re. Dinkins et al.

perly received. It was pertinent to the issue presented in the argument in the Court below, though not necessary, perhaps, under the view we have taken of the law. It certainly tended to repel the presumption of the payment of the execution, and to establish the insolvency and presumptive death of the lessor of the plaintiff, whose title to the land had been sold by the Sheriff, and which was the only title submitted by the plaintiff to the Jury.

[6.] The charge of the Court in regard to the death of the lessor of the plaintiff, was right. According to the date of the demise, in the declaration, the legal presumption of his death arose before that time; and though the lease is a fiction, it must be alleged to have been made by a person in esse, capable of making a lease. In many of the States, the death of the lessor of the plaintiff, pending the action, abates the suit; and although it seems not to have that effect in England, yet, the land cannot be recovered after his death, but the costs only; and a trial merely for the costs, under these circumstances, is unknown, in practise, there. The judgment of the Court below is affirmed.

No. 55.—Joseph White and another, plaintiffs in error, vs. William J. Dinkins and others, defendants in error.

^[1.] It is error to refuse to defendant the privilege of cross-examining the plaintiff's witness, as to the facts which would, if proven, defeat the action; nor is the error cured because the witness is subsequently introduced by the defendant and examined as to those facts.

^[2.] Where the defendant in trover relies upon two separate and distinct grounds of defence, and the Court, by its charge, submits the case to the Jury upon one of them only, and in such a way as to exclude, entirely, the other from their consideration, it is an error for which a new trial will be granted.

^[3.] A trustee may sell the property of his cestui que trust, to defray the ex-

White et al. vs. Dinkins et al.

penses of litigation to protect the trust estate: a fortiori may such sale be ordered by the Chancellor, where the cestui que trusts are infants.

[4.] If the defendant in trover relies, amongst other things, upon paramount outstanding title in another, the acts and declarations of the third person, disclaiming title in himself and acquiescing in the plaintiff's title, are admissible in evidence.

Trover, in Sumter Superior Court. Tried before Judge Perkins, August Term, 1855.

William J. Dinkins and others, the children of Elizabeth Dinkins, brought trover against the plaintiffs in error, for a They claimed under a deed of trust, negro man Lev or Levi. made 8th May, 1827, by Wm. P. Brown, the father of Mrs. Dinkins, by which she had a life estate, and these children an interest in remainder. The defendants below claimed, by virtue of a sale by the Sheriff, under a decree or order of the Court, directing the sale of this negro, to pay the fees of the Counsel of Mrs. Dinkins, incurred in litigation previously They also proved, by Horace Dinkins, the father of the plaintiffs below, that the mother of the boy Levi. though included in the deed of trust, was his property before the deed was made, having been sent home with his wife in 1820 or 1821. The plaintiffs below, in rebuttal, offered to prove, by Wright Brady, the admissions of Horace Dinkins, subsequent to the deed, that the negroes were the trust property of his wife. The Court admitted the evidence, and defendants below excepted. For the same purpose, the Court admitted the Sheriff's advertisement, and also the record of a bill in Equity, filed by Horace Dinkins as the next friend of his wife, for the appointment of a trustee. To this, also, the defendants excepted.

The Court charged the Jury, among other things, that if they believed Horace Dinkins surrendered or yielded his title to the negro, and allowed and acquiesced in her being included in the deed of trust, they should find for plaintiff. To this charge defendants excepted.

On these exceptions error is assigned.

White et al. vs. Dinkins et al.

WARREN; E. R. BROWN, for plaintiffs.

STUBBS & HILL; McCAY, for defendants.

By the Court.—LUMPKIN, J. delivering the opinion.

It is very apparent that injustice has been done in this case.

[1.] The defendants rely, first, on the title which they acquired under the sale ordered by the Court; and secondly, they insist that if this is not valid, the paramount title to this property is outstanding in Horace Dinkins; and that, consequently, the plaintiffs in trover cannot recover.

The plaintiffs offered James P. Guerry to prove property in Wm. P. Brown to Cela, the mother of Lev. The defendants proposed to show, by the same witness, upon cross-examination, that shortly after the marriage of Horace Dinkins with Eliz. Brown, the daughter of Wm. P. Brown, that Cela was sent home to her, and that she had remained in possession of Dinkins and wife, in Houston County, for many years before the deed of trust was executed. Hence, they infer a gift; and this is the outstanding title which they set up in Dinkins.

But the Court disallowed this testimony. Counsel for the defendant in error concede that this was wrong, but contend that the error was cured, inasmuch as Guerry was subsequently introduced by the defendants in chief, and testified to the facts sought to be drawn out upon his cross-examination.

But this will not do. The practical effect of this error was, to change the whole line of defence. The cross-examination of Guerry would have sent the plaintiffs out of Court, had the case stopped there; whereas, by rejecting it the burden was cast upon the defendants to make out Dinkins' title.

[2.] But this is not the only nor principal error manifest upon this record. The charge of the Court, in express terms,

White et al. ve. Dinkins et at.

excluded from the consideration of the Jury the title of the defendants, derived from the sale of Lev, ordered by the Court, and on which they mainly relied, and restricted them entirely to Horace Dinkins' title. The Court instructed the Jury, that if they believed that upon the marriage of Horace Dinkins with Elizabeth Brown, or soon thereafter, the father sent Cela home with his daughter, without the right to reclaim the girl, that by construction of law the title to the girl vested in Horace Dinkins, and they should find for the defendants, unless they believed, from the evidence, that Horace Dinkins surrendered the title thus acquired to Cela, and acquiesced in her being included in the deed of trust from Wm. P. Brown to Mrs. Dinkins and her children. In that event. the Jury should find the property for the plaintiff.

Now all this is correct, so far as Dinkin's title is concerned. But what becomes of the title derived from the judicial sale to Lev, the son of Cela? Is it not plain, that it was withheld altogether, by the charge, from the consideration of the Jury? It may be true, that Horace Dinkins lost the title acquired by marriage to this property; and yet, the plaintiffs may not be entitled to recover it. It was sold by order of the Chancellor, to discharge the debt due to Counsel for professional services, alleged to have been rendered the trust estate. And if this be so, their title to the negro is perfect, notwithstanding it may have been surrendered by Dinkins to his father-in-law, which we have no doubt it was competent for him to do, provided the rights of creditors or third persons were not prejudiced thereby.

[3.] The great question, we apprehend, in this case is, did the sale under the order of the Judge divest the title of the children who have brought this suit? It is insisted that the life estate of Mrs. Dinkins, only, was sold, and that the interest of the remainder-men was not and could not be impaired. This depends upon the object of the bill filed against the former trustee and in the prosecution of which the professional services were rendered; and for the payment of which Lev was ordered to be sold. If the benefits of that litigation re-

White et al. ve. Dinkins et al.

sulted to the children, as well as to the mother; and was necessary for the preservation of the corpus of the trust estate, as well as the income; in that event, the remainder-men should defray their proportion of the expense. The original bill was given in evidence on the trial, but there is no copy in the record. The presumption, of course, is in favor of the order if, indeed, it requires any presumption to support it. It may well be doubted whether it can be controverted, at any rate, so as to affect the title of the purchaser. Chancellor was, virtute officii, the guardian of these wards; and if the doctrine be true, and we believe it to be incontrovertible, that a trustee, without any authority from the Court, may sell trust property to defray the expenses of litigation, to protect the trust property, a fortrori, will a sale, ordered by the Chancellor himself, in a case which has been conducted under his own eye, pass the title to the purchaser.

[4.] We concur with Counsel for the defendants in error, that inasmuch as the defendants below relied on the title outstanding in Dinkins, it was competent to give in evidence the acts and declarations of Dinkins, showing title out of him; at least, up to the time of the judicial sale. And for myself, I am not prepared to say that these acts and admissions should be stopped at that time. That sale is based upon the hypothesis of title in the cestui que trust, and not in Dinkins; and these declarations are corroborative of the fact. The case stands precisely upon the same footing as though Dinkins, himself, were to sue for the slave.

Crosby, adm'r, &c. vs. DeGraffenreid,

No. 56.—Joshua P. Crosby, administrator, &c. plaintiff in error, vs. John C. DeGraffenreid, defendant in error:

[1.] A, to defraud his creditors, transfers his property to B, and dies. His administrator files a bill against B, to get possession of the property, that he may, with it, pay the creditors: Held, that there is no equity in the bill.

In Equity, in Dougherty Superior Court. Decision on demurrer, by Judge PERKINS, November Term, 1855.

Joshua P. Crosby, as the administrator of Bartlett C. Green, filed his bill against John C. DeGraffenreid, alleging that his intestate being sued upon a debt, whose justice he denied, turned over to defendant eight promissory notes. amounting to \$1929 60, and took his receipt for them for collecting, without specifying the makers' names or the amounts; that he, at the same time, delivered to defendant \$316 in cash, and took his note therefor; that this whole arrangement was made to defeat the collection of this unjust debt; that subsequently, relying on the promises of defendant to do right, and in furtherance of the same scheme, B. C. Green gave to defendant a receipt in full, against this note and receipt, without any consideration therefor; that the estate was indebted to a greater amount than these sums would pay, and there were no other assets to satisfy creditors. prayer was for a discovery as to the makers and amounts of these eight notes, and an accounting for the same; and also for the note for cash.

A general demurrer to this bill was sustained, and this decision is assigned as error.

R. F. Lyon, for plaintiff in error.

STROZIER & SLAUGHTER, for defendant.

Crosby, adm'r, &c. se. DeGraffenreid.

. By the Court.—Benning, J. delivering the opinion.

[1.] Was the administrator, Green, entitled to have from DeGraffenreid an account of the notes and money conveyed to the latter by the intestate of the former?

The notes and money had been delivered to DeGraffenreid by the intestate, before his death. It does not appear that they were ever in the possession of the administrator.

The transfer of the notes and money was good, not only against the intestate, who made the transfer, but also against his administrator. The Statute of the 13th Elizabeth, makes such a transfer void, as against creditors, their heirs, executors, &c. and them "only." (Rob. on Fraud. Con. 2 note (a.) Such a transfer, therefore, is good against him who makes it, and his executors and administrators. Such is the necessary inference from the words of the Statute.

Accordingly, it was decided, soon after the enactment of the Statute, that the administrator of a fraudulent transferer of goods, was bound to deliver them to the transferee; and this, although the administrator insisted that the transfer was fraudulent, and that the transferrer had not goods, besides those, sufficient to pay the creditors intended to be defrauded. (Hawes vs. Leader, Cro. James, 270, and see 1 Amer. Lead. Cas. 58.)

It is true that this case may, perhaps, be somewhat in conflict with the earlier case of Bethel vs. Stanhope. But I do not know that it is. It is not clear, from the facts of that case, whether the gift had ever been completed in the lifetime of the fraudulent transferee. He died "possessed" of the goods, and the transfer, itself, was to be void on the payment of twenty shillings. After his death, the transferee took possession of the goods. It was held that this was a trespass against his administrator; that the goods were assets in the administrator's hands. (Bethel vs. Stanhope, Croke Eliz. 810.)

It seemed, however, to be admitted by the Counsel for the

Crosby, adm'r, &c. se. DeGraffenreid,

plaintiff in this case, that a fraudulent transfer by a testator, is good, at Law, against his executor. But it was insisted, that as the executor is a "trustee" for creditors, such a transfer would not be good in Equity, against him.

But why should there be a difference in Equity? The executor is as much trustee for the creditors at Law, as he is in Equity.

And what is it that the executor is trustee of, whether in Equity or at Law? The property which the testator had at the time of his death. But property which a testator has transferred before his death, even although he may have transferred it to defraud his creditors, is not, at the time of his death, his property. The transfer takes the title out of him, and vests it in the transferee, indefeasibly as to all the world except those creditors. And those creditors have no title to the property. They have the right to subject the property in the hands of the transferee to the payment of their debts, and that is all the right they have.

If this be so, the executor cannot be a trustee for the creditors of this property. He can no more be such trustee, than could his testator have been had he lived. Can the fraudulent donor, himself, in Equity, recover back the property from the fraudulent donee, on an allegation that he wants it for use in the payment of the defrauded creditors? If he cannot, how can his executor? Can an executor have more rights than his testator had?

Besides, there would be no use in allowing this executor to recover back this property. The creditors do not need the aid of the executor, in order to bring the property within their reach. They can reach it themselves. Let them get their judgments against the executor, establishing the existence of their debts. If these judgments shall be even judgments of assets in futuro, yet, they will be such judgments as may be enforced by the creditors themselves, against the property; certainly with, and perhaps without, the aid of a Court of Equity. (Allen vs. Matthews, 7 Ga. R. 149;

Crosby, adm r, &c. vs. DeGraffenreid.

Trippe of Slade and others vs. Lowe's Adm'r, and others, 2 Kelly, 304.)

It is no more incongruous that such a judgment should bind such property, of which the executor himself has neither the possession nor the right of possession, than that a judgment against the fradulent donor himself should bind the property which he has transferred; for by the transfer the property has ceased to be his.

In both cases, the judgment ascertains the existence of the debt. The rest the Statute may do, as well in the one case as in the other; i. e. make the property subject to the payment of the debt which the judgment has ascertained.

Not only is there no use for the interposition of this executor, but such interposition would, of necessity, do more harm than good. It would diminish the property by an amount equal to the cost of administering the property; it would be attended by increased delay, increased expense and increased risk in the accomplishment of the object; it would force out of the hands of the transferee the whole of the property, when, perhaps, the debts to be paid out of it would require but a part.

We think, therefore, that the Court below, in sustaining the demurrer to the bill, did right.

We may remark, in conclusion, that we see no insuperable objection to DeGraffenreid's being treated by the creditors of Green, as executor de son tort of Green.

Morrison et al. vs. Hays.

No. 57.—LAUGHLIN MOBRISON et al. plaintiffs in error, vs. Moses Ann Hays, defendant, in error.

- [1.] The doctrine in Royall vs. The Lessee of Lisle and others, (15 Ga. Rep. 545,) re-affirmed.
- [2.] If one merely enters upon land and commits a trespass, and then goes off and another comes after and commits a trespass, in such case there is no continuity of possession: for whenever the first trespasser quit the possession the seize of the true owner is restored. But the several possessions may be tacked so as to make the continuity efficacious where there is a privity of estate between the successive tenants, or the several titles are connected.
- [3.] If illegal testimony is allowed by the party to go to the Jury, without objection, it is no ground for a new trial, under the Act of 1853-'4.
- [4.] Whether the defendant's possession be in subordination to the title of the true owner, depends upon the character of the possession. If consistent with the idea of paramount title in another, it is in subordination; otherwise it is not. In England, where lands are generally cultivated by a tenantry, the doctrine of adverse possession is not so liberally construed as in this country, and especially in the newer portions of it, where the occupant of land is usually the owner of the soil.

Ejectment, in Calhoun Superior Court. Tried before Judge Perkins, November Term, 1855.

This action was brought by Laughlin Morrison vs. Moses Ann Hays for a tract of land. On the trial, the plaintiff showed a perfect chain of title. Defendant relied upon the Statute of Limitations. The proof was, that Thomas S. Hunt took possession of the land in 1842, built a house thereon and cleared a part of the land, lived there in 1843. In 1844, Thomas Street lived there, and in 1845, Bagwell lived there; in 1846, McDonald lived there, and in 1847, Hays, husband of defendant, lived there. Hunt made a deed to this lot to Sutton 1st October, 1845. Sutton conveyed to McDonald 10th November, 1845. McDonald conveyed to Owens 1st July, 1846, and Owens conveyed to Hays 2d September. The Court admitted the sayings of Street, while in possession, that he was tenant for Hunt; also of Bagwell,

Morrison et al. ve. Hays.

while in possession, that he had rented the land from John McQuordale as agent for Hunt, and the sayings of Hunt that. McQuordale was his agent. This evidence was not objected to by plaintiffs when admitted.

The Jury found a verdict for defendant for the whole lot of land.

A new trial was moved for-

1st. Because the verdict was contrary to law and evidence, and the weight of evidence.

2d. Because it was contrary to the charge of the Court, which was, that the defendant, or those under whom she claimed, must have been seven years, next before the commencement of the action, under claim of title in the continued possession of the land.

3d. Error in the Court in admitting the sayings of Street, Bagwell and Hunt.

4th. Error in the Court in declining to charge as requested, that every possession is, *prima facie*, in subordination to the true title, and the *onus* to show that it is not is upon those claiming adverse possession.

The Court refused a new trial, and plaintiff excepted.

LYON & CLARK, for plaintiff in error.

CARUTHERS; McDougald; WARREN, for defendant.

By the Court.—LUMPKIN, J. delivering the opinion.

[1.] In the case of Royall vs. The Lessee of Lisle and others, (15 Ga. R. 545,) this Court say: "We understand the doctrine to be briefly this: the person owning the title to land is constructively in possession, and this possession continues until some adverse claimant goes into the occupancy, with intent to claim the fee, as against the true owner; and this intention may be manifested by declarations or by acts of ownership, which are open, notorious and visible."

We re-affirm the doctrine thus succinctly stated; and ta-

Morrison et al. se. Hays.

king that case as our guide, we are clear that this verdict was contrary to law and evidence, and the charge of the Court; and that the finding should have been for so much of the lot of land as was not inclosed and cultivated by the defendant. He was not in for seven years under paper title, nor was his possession, as to so much of the lot as was unenclosed, of such a character as to amount to an assertion to the world that he, bona fide, claimed the fee as against the true owner and every body else. His adverse possession, therefore, was confined to the possessio pedis, or corporeal occupation.

It is argued by Col. McDougald, with much ingenuity, that the very action itself admits the possession, by the defendant, of the whole lot; else why, he asks, sue for the whole? Why not limit the writ to so much as is in the actual occupancy of the defendant, and enter upon the balance as vacant? The answer is this: the present tenant is in possession of the whole because she occupies a part under paper title; and such was the character of the possession for five years before the ejectment was brought. Previous to that there was possessio pedis only, so that the present tenant, although constructively in possession of the whole, has a statutory title only to this possessio pedis; still, the necessity of including the entire lot in the writ is obvious, because, at the commencement of the suit, Mrs. Hays was in the possession of the whole, being in the possession of a part under paper title to the whole.

If authority was needed to show that judgment may be given for the residue, where the defence is good only for a part of the premises, it is abundant. (Underwood ads. Jackson, 1 Wend. 95; Clay vs. White, et al. 1 Munf. (Va. Rep.) 162.)

[2.] One of the necessary elements of adverse possession is, its continuity; and it is argued by Col. Clarke, that such adverse possession is not efficacious, when taken successively by different persons. This depends upon the circumstances of the case. We think the better doctrine is, that where several persons enter on land in succession, the several possession.

Morrison et al. es. Hays.

- sions cannot be tacked so as to make a continuity of possession, unless there is a privity of estate, or the several titles are connected. (7 Serg. & Rawle, 177; 5 Met. R. 15; 8 Wash. C. C. R. 475; 6 Pick. 415; 20 Ibid, 465; 9 Cowen, 653; 10 Johns. 475.)
- [3.] As to the evidence of McQuordale, as to what Hunt said, we concede that it was illegal; but not having been objected to by the plaintiff, it is no ground for a new trial, even under the stringent Act of 1853—'4. It cannot be said to have been admitted by the Court; it went to the Jury by the implied consent of the party. And the maxim, non fit volenti, applies. Suppose a party expressly agrees that incompetent testimony shall go to the Jury—can he get a new trial because, in the language of the Statute, illegal evidence was admitted? Surely not.
- [4.] The Court was asked to charge, that every possession was in subordination to the title of the true owner. The Judge properly refused so to instruct the Jury. It depends upon the nature of the possession. Is it consistent with the idea of paramount title in another? If so, it is subordinate; otherwise, it is not. The line of demarcation cannot be accurately drawn.
- [5.] In England, where the whole country is cultivated by tenantry, the rule requested would generally apply. Not so much, however, in this country, and especially at the South, where almost every occupant of land is the owner and "lord of all he surveys."

Phillips et al. vs. Behn & Foster.

- No. 58.—John N. Phillips et al. plaintiffs in error, vs. Behn & Foster, defendants in error.
- The Superior Court has power to rectify an order establishing a lost paper, by the paper itself, when found.
- [2.] It is to be presumed that a verdict which is expressed to be "for principal and interest," is meant to be for the principal and interest claimed in the declaration, especially if judgment has been entered up for the principal and interest thus claimed, and the defendant makes no objection to the judgment.
- [3.] That there is an injunction against paying out part of a fund in the hands of a Sheriff, is no reason why the rest of the fund should not be paid out, and paid out to the claimants upon it according to the priorities of their respective claims.
- [4.] When a third person advances the money due upon a judgment, and takes no transfer of the judgment from the plaintiff, but takes a mortgage from the defendant, to secure the repayment of the advances, the intention, it is to be presumed, is to extinguish the judgment and to rely exclusively upon the mortgage as security for the repayment of the money advanced.
- [5.] Where a Sheriff has levied a number of f. fas. and is selling under them all, he is not at liberty to make an arrangement with the plaintiffs, in some of the f. fas. to receive from them, in payment of such of the property as they may buy, something else than cash, unless he has the permission of the plaintiff in the other f. fas. to make the arrangement.
- [6.] Property alienated pending an appeal, is as much bound for the payment of the damages for a frivolous appeal, as it is for the payment of the rest of the amount of the appeal judgment.

Rule, against the Sheriff. In Dougherty Superior Court. Decided by Judge Love, November Term, 1855.

Behn & Foster having a fi. fa. vs. Andrew Y. Hampton, moved a rule vs. the Sheriff, to show cause why he should not pay the amount due thereon from the fund in his hands.

The Sheriff objected to the granting of a rule absolute, on the following grounds:

1. Because the Behn & Foster fi. fa. and judgment, was upon an established record, the original having been lost; and from said record, it did not appear that there ever had been any judgment at Common Law vs. said Hampton, while.

Phillips et al. re. Behn & Foster.

by the date of the judgment on the appeal, said judgment was not entitled to any fund in Court. Since said established declaration, the original had been found and was in Court, upon which it appeared that there had been a judgment at Common Law, of a date older than any of the mortgages.

- 2. Because it did not appear from said established declaration, that the cause had been transferred from Baker Co. when the action was brought to the new County of Dougherty, in terms of the law creating said county, which requires the Clerk's certificate to the original papers, there being no such certificate by the Clerk of the Superior Court of Baker County. But on said original declaration found, there was such certificate, and the Court permitted Counsel for Behn & Foster, instanter, to take an order perfecting and making regular the conflict between the two records.
- 3. Because there was no verdict on the appeal to support such judgment, said pretended verdict being only for principal, interest and costs, and 12½ per cent. damages, without stating any amount.
- 4. Because a bill had been filed by Charles W. Horn and others, against said fund, setting up a lien upon and prior to all judgments and mortgages, for a claim against said Hampton as the guardian of certain minors; and under said rule, said fund was enjoined against all persons, to the extent of \$15.000, which injunction was still operative, and Behn & Foster would be compelled to contribute, pro rata, to the satisfaction of said claim, if successful upon a hearing.
- 5. Because the mortgage of said Wm. H. Young and John D. Atkins, making the firm of Wm. H. Young & Co. was the junior mortgage, but was predicated on a certain fund that said firm advanced to the Sheriff of Dougherty County, on certain judgment indebtedness of said Andrew Y. Hampton, which judgments were older than the Behn & Foster judgment, or any of the mortgages, and Counsel for Young & Co. asked time to file a bill against the other creditors, that a decree may be rendered, subrogating them to the rights and

Phillips et al. vs. Behn & Foster.

liens so paid for, to the Sheriff of Dougherty County, and providing, generally, for the distribution of the fund in Court, settling the equities between all the parties in interest.

6. Because said fund ought not to be distributed until it is first ascertained what mortgagee shall be postponed on account of said Behn & Foster's lien, or whether they shall all contribute pro rata to its satisfaction. It also appeared that the mortgage property had been bid off by the several mortgages, and their several bids taken as cash. Upon hearing these objections, the Court over-ruled them all and permitted Counsel for Behn & Foster to take a rule absolute for the principal, interest and costs of said fi. fa. including damages on the appeal. To all which Counsel excepted.

LYON & CLARK, for plaintiffs in error.

BUFORD & CONNELLY, for defendants.

By the Court.—BENNING, J. delivering the opinion.

[1.] The Court below certainly had the power to pass the order for the rectification of what is called the record. The power to establish lost papers, is a power to establish them correctly. And so, the Court had the power to pass an order for imparting to the papers or "record," when found, the virtue which it had when lost, if, indeed, such an order was needed.

These powers the Court had under the grant of power to the Courts in respect to lost papers made by the Judiciary Act of 1799, and the grant to them of power to amend made by the Act of 1818. (*Pr. Dig.* 420, 442.)

And if the Court had the power, the case was obviously one in which the power should have been exercised.

There is nothing then, in the first two grounds of the Sheriff's showing.

When a verdict is expressed to be for principal and interest, the presumption must be, that the principal and interest

Phillips et al. vs. Behn & Foster.

meant, are the principal and interest claimed in the declarations. What else can be meant? And we are bound to give to a verdict some meaning, if possible.

It has been common in practice, that a verdict should be expressed to be for a named sum, "as principal, besides interest." And it has always been considered that the interest intended by such a verdict, was interest to be counted on the sum named, and from the time when that sum fell due, according to the declaration.

[2.] The principle which will justify such a presumption, will justify a presumption, that in a verdict of the former sort, the "principal" meant is the principal claimed in the declaration.

Especially will it justify such a presumption, if the judgment is entered up for that sum as principal, and the defendant in the judgment takes no exception to the judgment.

- [3.] The fund in the hands of the Sheriff, amounted to over \$20.006. Of this sum the bill filed by Horne and others, enjoined as much as \$15.000 and no more. The existence of the injunction, therefore, constituted no reason why the excess over \$15.000 should not be paid out to judgments according to their comparative priorities. The fact that there was or might be a claim on a part of the fund, of a dignity superior to that of any of the judgments, could not change the relations which the judgments bore to one another in respect to the other part of the fund.
- [4.] When Wm. H. Young & Co. advanced to the Sheriff the amounts of the judgments against Andrew Y. Hampton, mentioned in the statement of facts, and took a mortgage from him to secure the repayment of the advances, they, it is to be presumed, intended to extinguish the judgments and to rely exclusively on the mortgage for their security; otherwise, they would have taken a transfer of the judgments, and would not have gone to the trouble which, in that case, would have been useless, the taking of the mortgage.

But if we have to make this presumption, then we have to say, that in respect to these judgments—judgments thus to

Phillips et al. vs. Behn & Foster.

be considered extinguished—there exist no rights to which they, Wm. H. Young & Co. can be subrogated.

At all events, it will be time enough for the Sheriff to set up this objection, when Wm. H. Young & Co. step forward and get their claim of subrogation recognized by a Court.

[5.] The fund in the hands of the Sheriff was the proceeds of the sale of property which had been sold under all the f. fas.—the f. fa. of Behn & Foster not less than the mortgage fi. fas. It was at the peril of the Sheriff, therefore, that he made any arrangement with the plaintiffs in the mortgage f. fas. without consulting the plaintiff in the other f. fa.—any arrangement by which he was to receive, in payment for the property, aught but cash. The command of that execution to him continued to be, to receive nothing but cash, an arrangement of that sort to the contrary, notwithstanding.

The property from which the fund in the Sheriff's hands was raised, had been "alienated" by the defendant in this Behn & Foster fi. fa. at some time between "the signing of the first judgment and the signing of the judgment on the appeal;" that is, the property had, in that interval, been mortgaged to these mortgagees.

It was decided, when this case was up before, (at Americus, in 1855,) that a mortgage is an alienation in the sense of the word alienation, as used in the Act of 1822, which makes property alienated between the signing of the judgment on the appeal and the signing of the judgment below, subject to the judgment on the appeal. (*Pr. Dig.* 451.)

The question now is, whether the property thus alienated, is bound for the damages in the appeal judgment, given for a frivolous appeal.

The Act of 1822 must mean, that no defendant shall, by the alienation of his property, pending an appeal, put the property in a condition in which it shall not be subject, either to the judgment on the appeal or to the judgment below. One of these two things it must mean. But it cannot mean the latter, because, by a judgment on the appeal, if not by the

Andrews w. Tinsley.

appeal itself, the judgment below becomes extinct. The Act must, therefore, mean the former.

[6.] But if the property, notwithstanding its alienation, is still to be subject to the judgment which may be obtained on the appeal, it is to be subject to every part of that judgment—to the part that is for costs on the appeal—the part that is for interest on the appeal—the part that is for damages for a frivolous appeal, as much as to the part that stands in the place of the judgment below, if, indeed, there is or can be any such part at all as this latter. Is not the judgment on the appeal to be considered as out and out a new judgment?

We think the judgment of the Court below ought to be affirmed. We agree with that Court in considering none of the grounds of the Sheriff's showing sufficient.

No. 59.—Garnett Andrews, plaintiff in error, vs. Thomas Tinsley, defendant in error.

[1.] It is not a good ground for a new trial, that interrogatories which were read to the Jury on the trial in Court, were carried to the Jury, after they retired to their room at their own instance, without the fraud or agency of the party in whose favor the verdict is found, merely to refresh their memory in regard to a matter concerning which there was no controversy between the parties.

Assumpsit, &c. in Clay Superior Court. Tried before Judge Perkins, September Term, 1855.

This was an action for damages for breach of contract, for the purchase of cotton. The Jury returned a verdict for the plaintiff; whereupon, defendant moved for a new trial, on various grounds; all of which were over-ruled but one, viz: "That the Jury sent for the depositions of two of the witAndrews vs. Tinsley.

nesses, and read them in the Jury room." On this ground, the Court granted a new trial; and this decision is assigned as error by G. Andrews.

Welborn, for plaintiff in error.

Jones & Carithers, for defendant in error.

By the Court. L-McDonald, J. delivering the opinion.

After the Jury who tried this cause were charged with it, and had retired to their room, they sent their Bailiff to the Clerk for certain interrogatories which had been read as evidence to them on the trial. The interrogatories were sent to them. This fact was taken as a ground, amongst others, for a new trial, by the defendant, against whom the Jury rendered a verdict.

[1.] The Court below over-ruled the motion, on all other grounds embraced in the rule, and granted a new trial on The decision of the Court was excepted to, and error is assigned thereon. It does not appear that the plaintiff or his Counsel had any agency in sending the interrogatories before the Jury. It appears that the purpose for which the Jury desired to see the interrogatories, was to refresh their memories in regard to the time and the amount of sales of the cotton, (the action being founded on a breach of contract for the purchase of cotton,) matters in relation to which there does not seem to have been any controversy between the parties. Affidavits were received in the Court below, to establish this fact; and in the argument before this Court, it was conceded. In an old case, it was decided, that if the Jury, without the direction or leave of the Court, carry with them from the bar written evidence, which was given in Court, it is no ground for a new trial. (King vs. Burdett, Salk. 645.) It is unnecessary for us to say that we would go to that extent. The evidence might be to settle a question over which there was a controversy. We only say, that

Savage w. Jackson.

whenever it appears that the evidence, as in this case, (without the fraud or agency of the party in whose favor the verdict is found,) which was read to the Jury in Court, is carried to the Jury at the instance of the Jury themselves, to refresh their memory in regard to a matter concerning which there is no controversy between the parties, a new trial should not, for that cause alone, be granted. I will however remark, as was said in the case of King vs. Burnett, that the Jury in such case, are punishable, as well, I will add, as the Bailiff and Clerk, who aided in getting the evidence before the Jury.

The judgment of the Court below is reversed.

No. 60.—CESAR A. SAVAGE, plaintiff in error, vs. John Jackson, defendant in error.

[1.] A, in conversing with B about renting from him a certain store-house for C, says of C that he is a fine man and the owner of nine or ten negroes—able to do well. B, actuated partly by this statement, and partly by the general deportment and business of C, sells to C, from time to time, during a period of six or eight months, a quantity of merchandise on a credit. This, C fails to pay for: *Held*, that the statement aforesaid made by A, did not render him liable to pay for the merchandise.

Motion for new trial, in Baker Superior Court. Decided by Judge Perkins, November Term, 1854.

This was an action for deceit, brought by John Jackson vs. Cæsar A. Savage, in false representations as to the solvency of one P. B. Bond. The testimony, as to the representation, was as follows:

WM. W. MANNA testified: That he was clerk of John vol. xix-89

Savage ... Jackson.

Jackson, and had a conversation with defendant (Savage) sometime in the month of February, 1847, relative to renting a certain store-house in Albany, known as the "Red House," belonging to Jackson, to Mr. P. B. Bond, who the defendant represented to be his brother-in-law-to be a fine man and the owner of 9 or 10 negroes—able to do well. In consequence of this conversation, witness, as clerk, extended credit to Mr. Bond in the store, to the amount of about \$250. Bond paid about \$80 on the account, and gave his note for Savage was proposing to rent the store-house the balance. for a carriage shop for Bond. Witness did not ask Savage about Bond, as the conversation led him to believe that Bond was quite solvent and a gentleman. Bond was engaged in business in Albany, and appeared to do well. The credit was extended to him-1st. Because of Savage's representations; and 2d, because of Bond's general deportmentand business.

ISAAC BOND testified: That P. B. Bond's pecuniary circumstances, when he moved to Albany, were bad, and that fact was known to Savage. His character was good as any one's; he generally got credit when he asked for it, and complied with his contracts, to the best of his ability.

The Jury found a verdict for plaintiff. A new trial was moved for on several grounds; among others, that the verdict was contrary to law and evidence. The Court below refused a new trial, and this decision is assigned as error.

R. F. Lyon, for plaintiff.

MORGAN, for defendant.

By the Court.—Benning, J. delivering the opinion.

[1.] The verdict in this case, as it seems to us, was contrary to law. If there is any decision to give it support, it must be the decision in Pasley vs. Freeman, (3 T. R. 51; 2 Smith's Lead. Cases, 55.) But the decision in that case is

Savage vs. Jackson.

not one to give it support, for that case differed from this, in essential particulars.

- 1. In that case, the representation made was, that the purchaser of the goods was a person "safely to be trusted and given credit to," in "respect" to the very goods, in respect. to which he was trusted—sixteen bags of cochineal. In this, the representation made had express reference to the renting of a house to or for the person who was afterwards trusted for the goods. The representation had no reference to the selling of the goods to him; certainly none to the selling of goods to him in the fashion in which the goods were sold to The goods were sold to him in parcels, and the sales ran through a period of more than eight months. Surely it cannot be maintained that a representation, to the effect that a man is safely to be trusted for the rent of a named storehouse, means to affirm, that the man is safely to be trusted for the price of an indefinite quantity of merchandise, to be furnished to him in parcels from time to time, as his occasions may require, through an indefinite period of time.
- 2. In Pasley vs. Freeman, the credit was founded on faith in the representation. In this, the credit was only in part founded on faith in the representation. In part, the credit was founded on faith in the "general deportment and business" of the person himself, about whom the representation was made. How, then, it is possible, in this case, to tell what part of the credit it was that was founded on the representation, and what part it was that was founded on the "general deportment and business" of the person himself, in whose favor the representation was made. And certainly the person making the representation ought not to be held responsible for that part of the credit, which was not founded on faith in his representation.
- 3. The representation in this case is far weaker—far less certain, than was that in *Pasley vs. Freeman*. The man "is able to do well." We frequently say that a man is *able* to do well, when we mean to intimate a belief, or at least a fear, that he will not do well.

Savage vs. Jackson.

In these important particulars, therefore, does the case in which this verdict was found, differ from *Pasley vs. Freeman*. This verdict, therefore, can derive no support from the decision in that case.

But is the decision in Pasley vs. Freeman to be regarded as right? I think not.

It is certain that that decision does not have for this Court the force of a precedent. It was made in 1789; and that was long after the time when the law of England was adopted by Georgia—long after the time when Georgia was colonised.

That decision, too, from its very date, met with strong opposition in England. At the time when it was made, Mr. Justice Grose ably and strenuously dissented from it. Lord Elden could never abide it. It is one of the few things upon which he, as it seems, felt himself justified in making offensive war. (Eans vs. Bicknell, 6 Ves. 186.) Both he and Mr. Justice Grose regarded the decision as violating the fourth section of the Statute of Frauds. And in this were they not right? When a Statute says that a promise to answer for the debt of another, shall not bind, does it not say that any less thing shall not bind? And a representation that a man is solvent, is a less thing than a promise to answer for the man's debt.

The decision was without a precedent; yet, cases like that in which it was made, must have been occurring with more and more frequency from the very birth of credit.

It is a decision which, as I conceive, was not true to what was the real understanding of the parties in the case; for if it had been the real understanding of the parties, that one should become bound to the other, they would not, I feel sure, have left a matter of so much importance unexpressed.

It is a decision which, as it strikes me, disregards the principle, that a loss occasioned by one's own negligence, is one's own loss—a principle which would have made the plaintiff, if he had been an executor, and the goods which he sold

Savage w. Jackson.

on the credit of the naked representation had been assets, guilty of a devastavit.

It is a decision which has to assume, that every man is, without pay, under a *legal* obligation to every other man, to tell him, knowingly, nothing false.

It is a decision which practically violates the principle, that he who feels the benefit ought to bear the burden, for the form of action in which the decision was made being in tort, an effect of the decision was to make the defendant a tort feasor; and so, to prevent him from having the chance to reimburse himself out of the party who got the goods on his representation, for no tort feasor is entitled to call on another person for indemnity; and yet, the action had to be in tort, for if it had been in contract, stating an implied promise, it would have fallen directly within the fourth section of the Statute of Frauds.

Whether a man is trustworthy or not, is matter of mere opinion. And if A says of B, that it is his opinion that B is trustworthy, the strong presumption of law is, that this is A's opinion; for A gains nothing whatever by saying that it is his opinion. And to prove that at the time of the statement B had no property, or even had no character, would be only to raise a strong presumption that the statement did not express A's real opinion.

And this is certainly as much as can be proved in a vast majority of the cases dependent on statements like this. The result is, that all that the plaintiff can do by proof in such cases, is to raise a strong presumption in his favor, and set it against the strong presumption which the law has raised in favor of the defendant. But of these two presumptions, the one in favor of the plaintiff will be a presumption of guilt; the one in favor of the defendant, a presumption of innocence. Now the decision in Parley vs. Freeman, being free to choose between these two presumptions, takes sides with that of guilt. True, the decision was on a demurrer to the declaration; and so, technically, was one which had no

Harrison & Seward vs. Savage.

reference to evidence; but still, in practice, it does this, or it is worthless.

Finally, Parliament, after allowing the decision to stand long enough to show the sort of fruit it would bear, laid the axe to its root. In the ninth year of Geo. IV. under the auspices of Lord Tenterden, Parliament passed an Act containing these words: "No action shall be maintained, whereby to charge any person upon, or by reason of, any representation or assurance made or given concerning or relating to the character, conduct, credit, ability, trade or dealings of any other person, to the intent or purpose that such other person may obtain credit, money or goods upon, unless such representation or assurance be made in writing, signed by the party to be charged therewith." (Note to Chandelor vs. Lapers, 1 Smith's Leading Cases, 63.) And this was done, says Smith, to prevent the Statute of Frauds from being trenched upon by this decision in Pasley vs. Freeman.

No. 61.—HARRISON & SEWARD, plaintiffs in error, vs. CESAR A. SAVAGE, defendant in error.

[1.] A party suing a third person for goods furnished on his recommendation, must make it appear in evidence that the recommendation was made to himself or his agent, or to some one else who communicated such recommendation, for the purpose of obtaining the credits.

Deceit, in Lee Superior Court. Tried before Judge Work-RILL, March Term, 1855.

This action was for false representations as to the credit of one P. B. Bond. The declaration averred that plaintiff gave the credit by reason of representations made by defendant to plaintiff "and others." On demurrer, the Court held that the names of the others should be set out in full. This is the first error assigned.

Harrison & Seward vs. Savage.

On the trial, plaintiff offered in evidence his day-book—after making the usual preliminary proof, for the purpose of giving in evidence an entry, to show that the notes mentioned in plaintiff's declaration were given in liquidation of the account made by P. B. Bond. The Court rejected this evidence, and this is the second error assigned.

Morgan, for plaintiffs in error.

Lyon, for defendant in error.

By the Court.—McDonald, J. delivering the opinion.

[1.] This action is founded on alleged false representations made by defendant "to plaintiffs, Hansell W. Harrison and others," in respect to the credit and solvency of one Pembrake B. Bond, by which they were induced to sell Bond a bill of merchandize.

The defendant demurred to the declaration, on the ground that the names of the persons meant by the term "others", were not set out in the declaration. The Court suspended its decision on the demurrer, until the defendant's evidence was heard.

The plaintiffs then proposed to read the depositions of James W. Thornbury, Charles W. Rawson and John Jackson, but being objected to by defendant's Counsel, the objection was sustained by the Court, and Counsel for plaintiffs in error excepted; but no error is assigned on this exception.

The rejected evidence is made a part of the record, and we have looked into it, and there is nothing in it tending to prove that defendant ever made to plaintiffs, themselves, their agent, or to any one else who communicated them to plaintiffs, representations of any sort respecting Bond or his circumstances, or that he ever desired plaintiffs to extend a credit to him. In our judgment, the Court was right in ruling out the evidence.

It is unnecessary to go into the consideration, whether the

Harrison & Seward vs. Savage.

day-book was properly rejected in this case, on the ground that it was not the book of original entries, as no special exception to it, on that ground, appears in the record. The only purpose for which the day-book could have been received, lawfully, in evidence, was to ascertain the quantum of damages to which the plaintiffs were entitled, after they had established the fraud of the defendant, which constituted the ground of their action, There having been no evidence, whatever, of that, and no further testimony having been proposed, the day-book was properly rejected.

We cannot recognize the right of a party to act upon reported recommendations to others, of a particular person as being worthy of credit, when no application was made by the person recommending, in his behalf, and then to look for a solvent man, who may have spoken a word of kindness of an unfortunate friend, with no intention to deceive or defraud any one, and compel him to pay a debt which the merchant's incautious anxiety to sell, may have induced him to make.

It is another thing, when the debt is contracted on the recommendation of the party to the seller, either directly or indirectly. The case of Young against Hall, illustrates a case of a direct as well as indirect recommendation. Hall recommended Brooks to T. Holcombe & Co. This was a direct recommendation. Holcombe & Co. not being in business, exhibited Hall's letter to Young, who acted on it, though not addressed to him, and sold Brooks goods. This was an indirect recommendation, on the faith of which Young had a right to act.

The judgment of the Court below is affirmed,

Williams et al. ve. Hollis.

- No. 62.—WILLIAM WILLIAMS and others, plaintiffs in error, vs. EZEKIEL HOLLIS and others, executors, &c. defendants in error.
- [1.] Action for use and occupation, cannot be sustained if defendant claims title adversely to plaintiff.
- [2.] Declaration cannot be amended, when the amendment proposed requires a total change in the structure of the declaration setting out a different cause of action.

Assumpsit, in Marion Superior Court. Tried before Judge WORRELL, August Term, 1855.

This was an action brought by the heirs of Thomas Williams against the executors of Thomas Hollis, for the use and occupation of a tract of land. The plaintiff showed by his own proof, that Thomas Hollis was a purchaser at Sheriff's sale; and consequently, held adversely to plaintiffs. Defendants demurred to the evidence and moved for a non-suit, on the ground that this action would not lie under those facts. Plaintiff's Counsel resisted the motion, and at the same time, proposed to add a count charging a forcible entry of the premises; or else, to change the declaration so as to make the case an action of trespass, or in some way to make the pleadings fit the case proven. The Court refused to allow the amendments, sustained the demurrer and dismissed the case. These decisions are assigned as error.

STUBBS & HILL, for plaintiffs in error.

BLANDFORD & CRAWFORD, for defendants in error.

By the Court.-McDonald, J. delivering the opinion.

[1.] The action for use and occupation will not lie, where vol xix-40

Lynch, &c. ve. Bond.

the defendants claim title adversely to the plaintiffs. Such a claim is inconsistent with the pretence that they occupy the premises as tenants of plaintiffs. The defendants in this case held the land adversely, and the relation of landlord and tenant could not be implied, and the action cannot be sustained.

[2.] The Court below decided correctly in disallowing the Neither the practice of the Courts nor the amendment. Statutes, in relation to amendments, as liberal as they are, would admit of it. The declaration is a perfect one, and requires no amendment. If it had been defective in form or substance, the plaintiffs might have amended it as a matter of right, but the difficulty was not that the declaration was defective, but that the action would not lie. The action was not wrongly entitled. All the allegations in the declaration show that it was correct in that respect. The proposition was, to change the entire structure of the declaration, and to allow the party to file a new declaration, giving a new aspect to the case throughout, setting forth a new cause of action. could not be done.

Judgment of Court affirmed.

A motion was made to dismiss the claim in this (and five

No. 63.—Asa Lynch, pro. ami, &c. and others, plaintiffs in error, vs. William Bond and others, defendants in error.

^[1.] The dismissal of a claim by the Court, at the instance of the plaintiff in execution, for failure to make parties, is not, under the Statute, a withdrawal of the claim, so as to prevent it from being interposed a second time.

Claim, in Talbot Superior Court. Decision by Judge Wor-RELL, September Term, 1855.

Lynch, &c. vs. Bond.

other cases consolidated with this) case, on the ground that the claim had been withdrawn more than once. The minutes of the Court showed, that at March Term, 1846, the claim was withdrawn at the motion of the claimant; and that at March Term, 1855, this order was taken: "The claimants failing to appear, make parties and prosecute their claim, it is, on motion of plaintiff, ordered that said claim be dismissed, and the ft. fas. proceed."

On this evidence, the Court dismissed the claim; and this decision is assigned as error.

INGRAM & CRAWFORD, for plaintiffs in error.

HILL, for defendants in error.

By the Court.—LUMPKIN, J. delivering the opinion.

[1.] The complaint in this case is, that the claim had been twice withdrawn before. Well, what of that? Is this a sufficient reason for dismissing a claim? Certainly not. The claimant might concede the truth of the assignment, and yet, demand a judgment in his favor.

The claimant has the right, under the law, to withdraw his claim capriciously, once only, except by the consent of the plaintiff in f. fa. If, then, it be true that he had withdrawn it twice before, he must, of necessity, have withdrawn it the second time, by the consent of the creditor. And that is no good reason, why he should not interpose it again. It may be withdrawn a hundred times; and it constitutes no bar to the property being claimed again. To authorize the construction put upon the Act by Counsel for the defendant in error, it should read, that "the claim should not be put in twice, unless by consent of the plaintiff." But such is not The language is, that "the claimant shall not the Statute. be permitted to withdraw or discontinue his claim more than once, without the consent and approbation of the plaintiff in execution." (Cobb, 533.)

But suppose the claim had been dismissed the first time it was put in, for failure to make parties; would this have been such a withdrawal of the claim, in contemplation of the law, as that it could not have been renewed? Such an interpretation would not only be unwarranted by the words of the Act, but against its obvious meaning.

The claimant might have been unable to make parties; and on this account, he is sent out of Court at the instance of the plaintiff. Certainly this is not the exercise of the right guaranteed to him by the Statute, of capriciously withdrawing his claim. If, then, his claim were dismissed by reason of some defect in the bond, or for any other cause, the same consequences would follow.

The plaintiff can compel parties to be made, by applying for letters, or causing them to be procured by some one else; and if the suit is not prosecuted, he can proceed to trial exparte, make out his case and condemn the property, with such damages as the Jury may award him. But if he prefers to dismiss the claim and re-advertise, he has made his election, and he must abide by it.

No. 64.—John C. Rogers and others, plaintiffs in error, ve. ELIZABETH FRENCH, defendant in error.

^[1.] If a parent gives a legacy to a child, not stating the purpose with reference to which he gives it, he is understood as giving a portion; and if the father afterwards advances a portion to that child, though of less amount, it is considered by the Courts as an ademption of the legacy. Aliter, as to the gift of a legacy by a stranger.

^[2.] Whether the advance adeems the legacy is a question of intention which may be deduced not only from the face of the will, but the presumed ademption may be destroyed or confirmed by parol englance.

[33.] The rule that to overcome an answer which is responsive to a bill, two witnesses, or one and corroborating circumstances, are required, does not apply to an answer upon information and belief only.

In Equity, in Marion Superior Court. Tried before Judge Workill, August Term, 1855.

John French and Elizabeth, his wife, filed a bill against the executors of John Rushin, dec'd, for the recovery of the legacies left them under the will. The bill and answer are voluminous, as is also the evidence in the case. The following is sufficient to understand the questions made in this Court:

The defendants gave in evidence the following receipt:

"July 30, 1830. Received of John Rushin Five Hundred Dollars, which is considered and to be considered by all whom it may concern, as that amount advanced by him, the said John Rushin, to me as legacy, that would ever be coming to me from him in his lifetime, or from his estate after his decease." (Signed,) JOHN FRENCH.

John Rushin's will was dated 26th June, 1855, and by that will heagave to Mrs. French a little negro worth not exceeding \$200, and one equal share of all his property. Subsequent to the making of his will, he distributed some of his enegroes to his children, and among others, to Mrs. French. There was some evidence to show that the question of the ademption of this legacy of the little negro had been submitted to Judge Taylor. Defendant's Solicitors requested the Court to charge—

1st. That if they believed that after the making of the will, bequeathing to complainant a little negro, worth \$200, over and above her equal proportion of the property to be distributed under the will of John Rushin, the testator, in his lifetime, gave complainant a negro of equal or greater value than the one mentioned in the will, this is prima facie, an ademp-

tion of the legacy; and to rebut this presumption of an ademption, the testimony must be clear and relevant, not presumptive merely, but a demonstration from the language and conduct of the testator, that he considered the gift by the will as a subsisting benefit."

The Court declined to charge the latter portion of this request, but charged, "that to rebut the presumption of an ademption, the Jury might resort to presumptive evidence, but the presumption must be clear and satisfactory. That if they believed the testator gave complainant, after the making of the will, and at or about the same time he gave other property to each of his other children of equal value, they might infer from these facts that the legacy was not adeemed.

Defendant's Counsel farther requested the Court to charge, 2d. That in a Court of Equity, the presumption is against a double portion, and the receipt given by French in 1830, although it bears date prior to the will, is, nevertheless, a charge against him, for which he is bound to account.

This the Court declined to charge. 3d. As to effect of a responsive answer, as evidence, and that an answer is responsive where it has necessary connection with and grows out of the allegation, and is explanatory thereof.

This the Court gave, and added: he supposed the latter clause referred to that portion of defendant's answer, which stated that Judge Taylor had determined that the legacy of the little negro was adeemed. The Court charged that this was not responsive, there being no allegation in the bill on the subject.

To these charges as given, and refusals to charge, defendants excepted and have assigned error thereon.

MILLER & HALL, for plaintiffs in error.

STUBBS & HILL, for defendant in error.

By the Court.—LUMPKIN, J. delivering the opinion.

[1.] Was the Court right in refusing to give the first

charge as requested, without the modification and explanation which accompanied it in the charge as given?

In ex parte Pye, (18 Vesey, 152,) Lord Eldon observes, "that where a father gives a legacy to a child, the legacy coming from the father to his child must be understood as a portion, though it is not so described in the will; and afterwards advancing a portion to that child, though there may be slight circumstances of difference between the advance and the portion, and a difference in amount; yet, the father will be intended to have the same purpose in each instance; and the advance is, therefore, an ademption of the legacy. a stranger giving a legacy is understood as giving a bounty -not paying a debt; he must, therefore, be proved to mean it as a portion or provision, either on the face of the will, or if it may be, as it seems it may, by evidence applying directly to the gift proposed by the will." (See also Elkenhead's case cited in 2 Vernon, 257; Precedents in Chancery, 182 and Ambler, 825.)

Thus, then, we have the rule clearly stated and carrying this doctrine of ademption to its utmost limits. The English Courts regret, as well they may, that it has been pushed so far. We see and feel the reasonableness of the rule which requires the Courts to lean against double portions, as it is And we can readily understand why a legacy in a will should be adeemed by a subsequent advance having the same object in view as the legacy, notwithstanding any slight difference in value or amount between the legacy and the ad-A father, for instance, directs by his will, his executors to pay to a daughter \$1.000 to purchase, upon her marriage, household furniture. The child, however, marries in the lifetime of the father, and he advances to her \$1.000, or some sum approximating to that for the same purpose specified in the will. This is, and manifestly should be, a case of ademption, and so should all others standing upon the same But suppose the legacy be a little negro for a nurse, and the subsequent advance be of money to buy a carriage-

is there any propriety in construing this advance to be an ademption of the legacy?

Listen to the reasoning of the Chancellor in the case of Pye, just cited in support of what he deduces from the books as the "unquestionable doctrine" of the Courts upon the subject: "By a sort of artificial rule, in the application of which legitimate children have been very harshly treated, upon an artificial notion that the father is paying a debt of nature, if the father afterwards advances a portion on the marriage of that child, though of less amount, it is a satisfaction of the whole or in part; and in some cases it has gone the length, consistent with the principle, but showing the fallacy of much of the reasoning, that the portion, though much less than the legacy, has been held a satisfaction, in some instances, upon this ground, that the father, owing what is called a debt of nature, is the judge of that provision by which he means to satisfy it; and though at the time of making the will he thought he could not discharge that debt with less than £10.-000, yet, by a change of his circumstances and of his sentiments upon that moral obligation, it may be satisfied by the advance of a portion of £5.000."

Is not such reasoning, from the mouth of such a Judge, well calculated to inspire the hope that the day is not distant when all precedents will be abolished, and every case be tried by an enlightened tribunal, upon its own merits! To such a consummation the world must, from the necessity of the case, to say nothing of its policy, sooner or later come; for the world will not contain the law books that will be written, much less will Lawyers and Judges, with their stinted income, be able to buy them. Necessity will become the mother of justice in this case, as she is said to be generally of invention. Would that some Caliph Omar would arise, to apply the torch to all the repositories of legal learning throughout the globe! Precedent—precedent—this is the vampire that is forever draining the very life-blood of justice. Give the books of reports as fuel for baths—they will contribute much

more to the health, happiness and convenience of the people, than as at present employed!

But to return from this digression, and without elaborating the rule further, we remark that the presumed ademption may be destroyed or confirmed by the application of parol evidence of a different intention by the testator. (2 Atkins. 48; 3 Atkins, 77; 7 Ves. 708; Select Eq. Cas. 141.) this was the substance of the charge as given. The Judge instructed the Jury, that they might, in order to rebut the presumption that the advance made by the testator to French and wife, in his lifetime, and subsequent to the making of the will was an ademption, look to the fact, of whether or not similar advancements were made to the other children. this the Court was authorized to do, by the testimony of Mrs. Wilkes, the widow of John Rushin, who states that she lived with the testator from 1834, the year before he made his will. down to 1843, when he died; and that the advancements made to all the children during that period were equal, and that the testator tried to make them so.

[2.] Was the advance of \$500 made in land, by the testator to John French, the husband of his daughter, in 1830. five years before he made his will, a charge against his share of the estate? The case of Upton versus Prince, (Cases Tem. Talbot, 71,) is cited in support of the proposition, that an advance made prior to the making of a will, may adeem The testator, William Prince, had two sons-William and Peter, Elizabeth, Sarah, Mary and Anne. his lifetime, and soon after the sons became of age, they desired their father to advance to each of them a sum of money towards setting them up in the world; and agreed that whatever he should advance should be part of what he should give them by will; whereupon, the father, on the 11th of June, 1734, advanced £1500 to William Prince, who gave the following instrument for the same: "Received of my father the sum of £1500, which I do hereby acknowledge to be on account and in part of what he hath given or shall, in and by

his last will, give unto me his son." And on the 31st March. 1727, the father advanced £1500 to Peter Prince, who gave a similar instrument to that of his brother. On the 17th of August, 1730, William Prince, the father, executed his will. which contains the following recital: "And whereas, I have heretofore paid to, given or advanced with my children, William, Elizabeth and Sarah, the sum of £1500 apiece: Now, I do hereby, in like manner, give and bequeath unto my three other children, Peter, Mary and Anne, the several sums of He then willed that the residue of his es-£1500 apiece." tate should be divided in six equal parts, and gives the one He deposited the two receipts sixth to each of his children. given by William and Peter in a drawer with his will: and intimated that the said drawer should not be opened after his death by either of his said sons, unless his other children, or one of his sons-in-law, were present.

The question was, whether Peter should have a new sum of £1500, upon the words of the will, or whether he should not be in the same case with William; they both being equally advanced by the father, and this seeming only a mistake in the testator? The Lord Chancellor decreed the £1500 received by Peter in his father's lifetime, to be a satisfaction for what the father gave him by his will, and that he should not have another £1500 upon the words of the will.

While we controvert the general doctrine, that a previous advance made to a child, shall adeem an express gift by a subsequent will, wherein and whereby the testator undertakes to dispose of the property which he then has, still, we are not prepared to deny the justice of this case. Here it was a question of intention—as it should be in every case—and all the facts go to show that Peter's name was, by mistake, inserted with those of the unportioned part of the children. The whole will establishes that it was the intention of the testator that the two sums of £1500 paid to William and Peter, should be deducted out of the legacies given to them; else, why deposit their receipts in a drawer with his will, with directions that the drawer should not be opened after his death

by either of his said sons, unless his other children, or one of his sons-in-law, were present?

Before dismissing this case, I would remark that the able Counsel, Mr. Hall, who adduces it, concedes that it is the only direct authority he can find upon the point; and if he has found none others, we may safely assume that none other exists. I will add, that Upton vs. Prince is only recognized by Mr. Williams on Executors, and other law writers in this way. They say, in referring to it, that if an advance previously made, will adeem a legacy, a fortiori will an advance made subsequent to the execution of the will. In our judgment, it is always a question of intention, in all cases, whether the advance be before or after the execution of the will; and that no arbitrary rule should control the matter.

How, then, stands the present case? The testimony shows, that in 1830, the date of the receipt given for \$500, given by French to his father-in-law, old man Rushin advanced \$500 to each of his children. This fact is not disputed; but it is insisted that French got \$500 extra of the rest; else, it is asked why should a receipt be required of him, when the rest gave none? Perhaps they have been lost or destroyed. The defendants, and not French, have had the custody of the testator's papers. Perhaps French lived at a distance and forwarded this receipt, not knowing but such an acknowledgment would be exacted of all. Be this as it may, there is one fact which, to our minds is conclusive, that this \$500 was not intended, by the testator, to be a charge on the legacy of In his will he mentions, in every other French and wife. case, what sums are to be charged against his other children or a portion of them; and there is not a word as to this extra advance, as it is pretended, to French. It was made five years only before the will was executed, and his attention was called to the subject by referring to the respective advances made to some of the other children. It is not likely that this would have been overlooked or forgotten. lent as to the \$500 advance made to each of the children in

1830. And from this we infer that the testator, himself, considered that all, at that time, were advanced pari passu. But it is suggested that the defendants have sworn to the fact, and that their answer is not overcome by counteracting testimony. They only testify as to their information and belief, and the rule does not apply to such answers.

[3.] Was the Court wrong in making the addition which it did to the 3d charge, as requested? It is not complained that the charge, as asked, was not given. The error assigned is, that the Judge selected that portion of the defendant's answer, which set forth the award made by Judge TAYLOR, and stated that the same was not responsive to the bill; whereas, it is urged that the same was responsive; and that admitting it was not, still, it was wrong to single out this particular portion of the answer, and omit any reference to the rest.

In the first place, we concur with the Circuit Court in holding that the reference to the award made by Judge Taylor, was not responsive to any allegation, but matter purely in evidence. And secondly, that the omission of the Court to refer to the rest of the answer, was favorable to the defendants. It left the Jury to infer that the balance of the answer was responsive.

It is finally contended, that the advancements made to the different legatees, and to French and wife amongst the rest, should be brought into hotchpot. But no such necessity exists, provided the advancements were equal; for in that event, each is entitled to an equal share under the will, of what remains. We see no error in this record, to make it proper to send back a case, like this, which has been pending so long, and occupied so much time of the country. There should be an end of litigation, unless manifest injustice has been done.

- No. 65.—Solomon Adkins, plaintiff in error, vs. Dozier Thornton, defendant in error. Dozier Thornton, plaintiff in error, vs. Solomon Adkins, defendant in error.
- [1.] Bank charters are held to be contracts and are to be interpreted as contracts.
- [2.] Each individual stockholder, by his acceptance of the charter, became a party to the contract, and is bound by all its provisions.
- [3.] The stockholders in the Planters' and Mechanics' Bank of Columbus, are liable for the ultimate redemption of all the notes or bills issued by that bank.
- [4.] A stockholder in that bank is not liable for the ultimate redemption of all the notes issued by the bank, but each stockholder is liable for such part thereof as bears the same proportion to the entire amount of unredeemed notes, that his stock bears to the capital stock of the bank.
- [5.] The creditor may proceed in Equity or at Law to enforce his rights; and the charter does not prescribe the form of action he shall adopt.
- [6.] Where the action of debt is referred to in the 11th section, it is referred to only to define and qualify the manner in which the person and property of the stockholder is to be held liable, and not to prescribe a remedy.
- [7.] The plaintiff in this case having elected to proceed at Law, his declaration ought to be so framed as to admit all the proof necessary to establish his demand; and there being no averment of the amount of outstanding unredeemed notes, and proof thereof being necessary to make out his case, the declaration is defective.

Debt, in Muscogee Superior Court. Decision by Judge WORRELL, December Term, 1855.

This was an action against Thornton as a stockholder in the Planters' and Mechanics' Bank of Columbus, to compel the redemption of the bills of said bank. Defendant demurred to the declaration of the plaintiff, on the ground that it contained no averment of the amount of the bills of the bank unredeemed and in circulation. The Court sustained the demurrer, and (plaintiff declining to amend) dismissed the action. This decision is assigned as error by the plaintiff.

The defendant, before making this motion, requested of the Court to compel the plaintiff below to answer sundry interrogatories which had been filed in compliance with the Sta-

tute. The Court refused the motion, and this decision is assigned as error by defendant.

DOUGHERTY, for Atkins.

H. HOLT and B. HILL, for Thornton.

The Court not being unanimous, the Judges delivered their opinions seriatim.

By the Court.—McDonald, J. delivering the opinion.

Whether or not there be error in the decision of the Court below, depends on the nature and extent of the liability of the defendant, as a stockholder in the Planters' & Mechanics' Bank of Columbus, for the ultimate redemption of the bills or notes issued by that bank. If the defendant is liable, as a stockholder in said bank, for a part of the unredeemed bills or notes issued by said bank, equal in amount to the shares and value thereof, which he holds in said bank, without regard to the aggregate amount of the unredeemed notes, and the notes sued on do not exceed the amount of the shares or the value thereof, however estimated, held by him in said bank. the declaration is good, and ought to be sustained; but if he is liable for such part, only, of said bills or notes as bears the same proportion to the amount in circulation, that the shares and the value thereof, held by him, bears to the capital stock of the bank, then the declaration is insufficient, and there is no error in the judgment of the Court below. measure of the stockholder's liability must be determined by his own engagement, as found in the 11th section of the Act incorporating the bank.

[1.] Charters of this description being held to be contracts, are to be interpreted as contracts. Where an act of incorporation is passed by the General Assembly, it amounts to nothing more, until accepted, than a proposition to contract. Its acceptance makes it a contract. The acceptance is the

work of individuals. The judgments of individuals necessarily pass upon the proposition before it is accepted, and the acceptance of the proposition by individuals, gives existence to the corporate body, which now has a being, in law, as an artificial person.

[2.] When the charter of the Planters' & Mechanics' Bank was offered to the persons named therein, and other persons who might become stockholders, the 11th section was a part of it, and each individual, no doubt, considered it for himself, as by his acceptance of it, it would become his contract, and he would be bound by all its provisions. The charter must be construed, then, as the contract of the defendant in error. and the 11th section of the charter is a part of it. liable, it is his own voluntary undertaking. Banking institutions have extraordinary privileges granted to them, and from which, if they are uprightly and honestly used, immense profits may be made, with but little prospect of detriment to the community. But revulsions in the commercial world might subject the best managed banks to heavy losses and jeopard the value of their notes in the hands of the people. have the power of substituting paper for a metalic currency, and, generally, to issue three dollars in paper for one in coin in their vaults. It is right that the community should have some protection against probable losses, beyond what was formerly provided in bank charters; and of late, the Legislature has generally inserted what is usually termed a personal liability clause, which is always a part of the contract of the corporators, or of the persons who become such. by their acceptance of the charter.

For the prospects of profit offered by the charter under consideration, the defendant in error has agreed to be bound in proportion to the amount of shares and the value thereof, which he holds in the bank, for the ultimate redemption of the bills or notes issued by the bank; and this defendant and his fellow share-holders are bound for the ultimate redemption of all the notes or bills issued by the bank, and the bona fide bill holder has this protection.

It has been insisted, in argument, that if the outstanding circulation should exceed the amount of the capital stock, that the excess over the amount of the capital stock is unprotected, and that each stockholder is liable to the amount of his shares only. There is nothing in the words of the charter, which is the stockholder's contract, to restrict the aggregate, personal, ultimate liability to less than the whole circulation; and there is certainly nothing, in the reason or spirit of it, so to limit it. The object and intent was, to protect the public against loss. Is the public so protected in this case—and what is this stockholder's liability? If the stockholders are all solvent, the public is protected; if they are not, a loss will be sustained on the whole circulation. equal to the part or proportion for which the insolvent stockholders would be bound. Is the defendant in this case liable for the ultimate redemption of all the bills or notes now outstanding, the bank being insolvent? By the plain terms of the charter, which is his bargain with the bill holders, as well as the State, he is not.

- [4.] He is bound for a part only, and such part as bears the same proportion to the aggregate amount of unredeemed notes that his stock does to the capital stock of the bank. His is a several liability and an ultimate liability. He is not bound to make good an insolvent stockholder's part; it is not his contract to do it. He is not bound in the first instance nor in the second instance, on any other debts of the bank, except the bills or notes issued by it.
- [5.] The creditor is not restricted to any form of proceeding to enforce his rights. He may proceed in Equity or at Law; and if at Law, he may elect any form of action, appropriate to such a case, which he may deem most convenient and advantageous to him.

The charters of most of the banks which give a remedy against directors for excessive issues of notes, prescribe the remedy. See *Charter of Bank of Augusta*, Rule 15, (Prince, 54,) and charters of other banks, (Prince, 60, 65, 85, 92, 101, &c.) In all these cases the action of debt is given. But in

none of the charters, in which there is a personal liability clause, is the remedy against the stockholder pointed out. They define the manner in which the persons and property of the stockholders are to be pledged and held bound, and some declare it shall be done in the same manner as in common commercial cases or simple actions of debt, while others declare, as is the case of the charter of the Planters' and Mechanics' Bank of Columbus, that they shall be pledged and held bound in proportion, &c. &c. "in the same manner as in common actions of debt." (Prince's Dig. 70, 86, 88, 93, 96, &c. &c. &c.)

[6.] By accepting the charter, the stockholder agreed that his person and property should be pledged and held bound in proportion, &c. &c. in the same manner as is therein prescribed, and not otherwise. The word "pledge," as used here, is not to be understood or construed to mean a mortgage or a pawn, but it is qualified; and the sense in which it is used, is explained by the words in the subsequent part of the same sentence—"in the same manner as in common actions of debt." How are the persons and property of a debtor pledged and held bound in common actions of debt? The person is liable to arrest on original, mesne or final process; and after judgment, his property is liable to be taken in execution and sold. The defendant and his property is pledged and held bound in this manner, and not otherwise.

[7.] In this case, the plaintiff has elected to proceed at Law, and has adopted the action of debt as his remedy. The bank being insolvent, he has a right to recover from the defendant, on the unredeemed notes issued by the bank, a sum which bears the same proportion to the aggregate amount of the unredeemed, outstanding notes, that the stock which he holds in the bank bears to the amount of the capital stock. His declaration ought to be so framed as to admit all the proof necessary to establish his demand, under this rule of the defendant's liability, and there being no averment in the declaration, of the amount of outstanding, unredeemed notes,

proof of which being necessary to make out plaintiff's case, the declaration is bad, and the judgment of the Court below must be affirmed.

LUMPKIN, J. concurring.

I concur on the point on which the Court is not unanimous, for the reasons given by me heretofore, when the same question was before the Court.

BENNING, J. dissenting.

In this case but one point was argued, and but one was decided; and that was, as to the nature and extent of the liability of a stockholder in the Planters' and Mechanics' Bank of Columbus, under the eleventh section of the charter of that bank.

On this point, the decision of the Court was, in effect, this: "that the aggregate body of stockholders are liable, under the charter, for all the bills issued by the bank, and that the liability of each is to be ascertained by this proportion: as the whole stock is to the outstanding circulation, so is each stockholder's stock to his part of the circulation to be redeemed."

From this decision I dissent. In my opinion, the proportionate liability of each stockholder extends to each and every bill of the bank lawfully issued by it, and is to be ascertained

Miller, &c. vs. Surls.

by this proportion: as the whole stock is to the whole of any bill, so is the stock of any stockholder to the part of the bill which he is liable to pay.

As to the stockholders, this proportion is theoretically the same, perhaps, as the other. But as to the bill holders, it is very different.

For this opinion of mine, I have stated my reasons in Lane vs. Harris, (16 Ga. 264,) and in Robinson et al. vs. The Bank of Darien, (18 Ga. 115.) It would be useless to repeat them in this case.

I have heard nothing in this case to make me distrust their sufficiency.

- No. 66.—A. J. MILLER, administrator, &c. and another, plaintiffs in error, vs. Thomas Surls, defendant in error.
- [1.] Where plaintiff and defendant in ejectment, both deduce title from a common grantor, it is needless to go back of him to make out the title.
- [2.] No adverse possession can originate against un estate, until administration is granted.

Ejectment, in Chattahoochee Superior Court. Tried before Judge WORRILL, November Term, 1855.

This action was brought upon the demise of James L. Martin, and also of A. J. Miller, as the administrator of William Hurt, deceased, to recover a lot of land. The defences were, general issue, and Statute of Limitations. Plaintiff showed a grant to Martin, and proved possession in defendants. Defendants showed a Sheriff's deed to one Tignor, dated October, 1840, reciting a sale of the land as the property of Eze-

Miller, &c. vs. Surls.

kiel Perry; a deed from Tigner to Bonnell, dated December, 1847, and a deed from Bonnell to Surls, the defendant, dated October 15th, 1850.

Thomas Surls, the son of defendant, was introduced as a witness. Plaintiff proposed to ask him if his father, at the time he purchased of Bonnell, was not aware of the claim of Hurt's estate. The Court ruled out the question, and plaintiff excepted. Defendant proved that he and those under whom he claimed, had been in possession seven years. Plaintiff, in rebuttal, offered a deed from Joseph May and Ezekiel Perry, dated March, 1839, to William Hurt. The Court rejected the deed, unless plaintiff expected to connect it with the grantee by regular chain. To this decision, plaintiff excepted.

Plaintiff also proposed to give in evidence an exemplification of the judgment against E. Perry, under which the land was sold, to show that it was younger than the deed to Hurt. The Court rejected this evidence, and plaintiff excepted.

The following was the answer of one of the witnesses: "Ezekiel Perry and Joseph May, were in possession at that time; Perry told witness that he had sold to Hurt." The latter clause was ruled out by the Court, and plaintiff excepted.

The plaintiffs requested the Court to charge—That if Emsly Lot was placed as tenant in possession by Hurt, that he could not subsequently, by attorning to Tignor, make his possession adverse to Hurt; and if, while he was in, Hurt died, and after the death of Hurt, Tignor put another in possession, then the Statute would not run against Hurt's estate, until administration granted; and if seven years had not since elapsed, the statutory bar would not avail them. The Court declined so to charge, and plaintiffs excepted.

The plaintiffs requested the Court to charge the Jury, that if the lot of land was divided by a road, and if the south half was not fenced in or cultivated, any part of it, then there could be no adverse possession to the true owner. The Court declined so to charge, and plaintiffs excepted.

Miller, &c. os. Surls.

THOMAS & DOWNING, for plaintiffs in error.

H. Holt, for defendant in error.

By the Court.—LUMPKIN, J. delivering the opinion.

We propose to discuss but two or three of the questions made in this case.

[1.] This is an action of ejectment, for lot No. 197, in the 7th district of what was formerly Muscogee County. There are three demises in the declaration: One in the name of Martin, the grantee—one in the name of the administrator of William Hurt, and one in the name of the heirs of William Hurt.

On the trial, the plaintiff, after introducing a copy grant from the State to Martin, and proving possession by the defendant and the value of the rent, closed his case.

The defendant, Surly, claims under Sheriff's title. The land in dispute was sold in 1840, as the property of one Ezekiel Perry, and bought by Tignor, under whom Surls holds. So far, the case was with defendant.

The plaintiff next tendered a certified copy of a deed from one Joseph May and Ezekiel Perry, the defendants in execution, by which it appeared that the land was sold to William Hurt in 1839. In connection with this evidence, the plaintiff also offered in proof a transcript of the record of the judgment under which the lot was sold, showing that the deed to Hurt was older than Tignor's judgment. The whole of this evidence was rejected.

Was not the proof proper? We think so, most clearly. When it was made manifest that both parties derived title through Perry, it was unnecessary to have the title beyond him. What if the plaintiff was unable to connect the title of Perry with that of Martin, the grantee? The plaintiff and defendant both claiming through Perry, the only question was, who was prior in point of time? And the testimony

Miller, &c. rs. Surls.

excluded by the Court, established that Perry's title had passed out of him to Hurt, before the date of the judgment, under the lien of which it was sold by the Sheriff; and consequently, that the purchaser, Tignor, took nothing by that sale.

And is not this right, in justice as well as in law? And God forbid that these two should ever be contrary, the one to the other. Would it not shock the understanding, to say that Hurt must lose this property because he was unable to establish the mesne conveyances from Martin to Perry, and yet to hold that Tignor, or his feoffee, should hold the land, claiming under Perry, although equally unable to produce the intermediate links in the chain?

[2.] The Court was requested to charge the Jury, that inasmuch as Lot, the acknowledged tenant of Hurt, down to the end of 1842, was in possession in 1841, when Hurt died, and that no administration was granted on Hurt's estate until 1851, that no adverse possession could originate against the administrator of Hurt, until his appointment as administrator in 1851.

And is this proposition debatable? It requires neither argument nor authority to sustain it. It is an axiomatic truth.

As all the consecutive rulings of the Court was based upon the assumption that Hurt's deed from Perry was rightfully withheld, it is needless to examine them seriatim. The foundation being unsound, the whole superstructure erected upon it falls to the ground, of course. Apart from the want of administration, we are inclined to the opinion, that neither the possession of Tignor nor his privies in estate, was adverse to Perry's title; but from its commencement down, in subordination to it.

Wyatt and another vs. Elam.

No. 67.—P. A. WYATT and another, plaintiffs in error, vs. W. D. Elam, defendant in error.

[1.] If a charge, in one of its bearings, is, in strictness, not legal, and in another is, though in strictness legal, yet calculated to mislead, a new trial will be granted.

Ejectment, in Marion Superior Court. Tried before Judge WORRELL, August Term, 1855.

Two demises were laid in this declaration: one under William Kelly, the drawer, and the other, William D. Elam. Defendants below, on the trial, placed Wm. D. Elam as a witness, who swore that the suit was at his instance alone, and progressing for his benefit; that he did not know Kelly; had never seen him, and knew nothing about him. Defendants moved to strike out this demise. The Court refused so to do, and defendants excepted.

It appeared that Wm. D. Elam claimed as purchaser at Sheriff's sale, under a deed dated December, 1849, and recorded in January, 1850. The defendant's title was through a Sheriff's sale, under a deed dated 6th May, 1845, and recorded 4th March, 1853, to one William Wells, and a deed from William Wells to defendants, dated 10th October, 1846, and recorded 4th March, 1853.

The Court charged the Jury, that the deed to Elam being recorded in the time prescribed by law, though of later date, took precedence of the earlier deeds, which were not recorded in time, unless Elam had notice of these prior deeds. To this charge, defendants excepted.

BLANDFORD & CRAWFORD, for plaintiffs in error.

ELAM, for defendant in error.

Wyatt and another vs. Elam.

By the Court.—Benning, J. delivering the opinion.

[1.] Although the Court refused to strike out the demise in the name of Kelly, yet, it appears that the plaintiffs' Counsel, when that decision was made, announced that they would try the case on its "merits," and that they, accordingly, then introduced proof under the other demise, and confined themselves exclusively to it; and that the Court, in its charge, also confined itself to that demise.

This amounted to an abandonment of the demise in the name of Kelly; and therefore, even if the decision of the Court was wrong, it would not be a ground, in this Court, for a new trial, as no motion was made for a new trial in the Court below, and the decision could do the defendant no harm. But we express no opinion on the decision.

Wm. D. Elam swore for the plaintiff, that at the time of his purchase, "he knew not of the existence of any deed to, or sale of said land."

The charge of the Court was made, probably, in reference to this testimony. And if this were the only testimony in respect to notice in the case, the charge would no doubt be a proper one.

But there was other testimony as to notice.

Peeples swore that the "minors had been in possession of said land ever since said first Sheriff's sale. The time of that sale was more than seven years prior to the commencement of the suit. The minors claimed under two deeds, both of which had been made more than seven years prior to the commencement of the suit.

The precise language of the Court, after stating, hypothetically, the times of the executing and the times of the recording of the opposing deeds was, "that the deed to said Elam, then, was entitled to precedence, and he obtained a good title as against the deed of said Wells and said minors."

Now in the use of this language, the Court either did not take into consideration at all the testimony and facts to

Robinson vs. Lane.

which I last adverted; or if it did, it did not take what we deem to be the right view of them. Whichever may be true, the language was calculated to mislead the Jury.

1. If the "minors" were in actual possession of the land when Elam purchased, that was, in law, notice to him of their title—notice to him of their deeds. And with notice of those deeds, he could gain no advantage over the claimants under them, by being the first to record a deed. So says the Statute. (Cobb's Dig. 175.)

The Court, we think, should have called the Jury's attention to this legal property or quality of actual possession.

2. The deeds of the minors, although not recorded, might, as color of title, have served to perfect a right to the land in the minors, by the Statute of Limitations. In this view, therefore, it was not, in strictness, correct in the Court to tell the Jury that Elam "obtained a good title as against the deed of said Wells and said minors," if his deed had been recorded in time, &c.

We think, therefore, that the plaintiff in error ought to have a new trial.

No. 68.—ALEXANDER J. ROBINSON, plaintiff in error, vs. RICHARD H. LANE, defendant in error.

^[1.] One of a company of stockholders, who participated in the illegal organization of a bank, upon a spurious and not a specie basis, as required by the charter, cannot, under the individual liability clause, maintain a suit upon the unpaid bills of the bank, against another stockholder; and evidence is admissible to show the fraudulent manner in which the bank was put into operation.

^[2.] Concomitant or contemporaneous declarations, are admissible in evidence, as forming part of the res gestar, and showing the character of the principal fact.

VOL. XIX-43

- [3.] Where the amount of the outstanding circulation of a bank is a fact necessary to be ascertained, any evidence should be received, which aids in fixing that fact.
- [4.] Where the shares of a bank are transferred by A to B, without consideration, and without the knowledge or consent of B, B is not the owner, in contemplation of the charter, and can only be made liable on the ground of fraud, viz: acquiescing in the transfer, after the fact is brought to his notice, for the benefit of some other person, and to the injury of the creditors of the corporation.
- [5.] By the 11th section of the charter of the Planters' & Mechanics' Bank of Columbus, it is provided, that "The persons and property of the stockholders, shall be pledged and held bound in proportion to the amount of shares and value thereof, that each individual or company may hold in said bank, for the ultimate redemption of the bills or notes issued by said bank, in the same manner as in common actions of debt:" Held, that the aggregate body of stockholders are liable, under this clause, for all the bills issued by the bank; and that the liability of each is to be ascertained and fixed by the following proportion, namely: as the whole capital stock is to the entire outstanding circulation, so is each stockholder's share to his part to be redeemed.
- [6.] In fixing the ownership of stock, it is not competent to give in evidence the declarations of the officers and agents of the bank, for that purpose. Third persons are not bound by their sayings.
- [7.] It is not proper, in order to screen a stockholder from responsibility, under an individual liability clause in a bank charter, to prove that assets sufficient to pay the creditor were turned over by the corporation to an assignee, chosen and selected by itself, and over whom the corporation had, by law, co-ordinate control with the creditors.
- [8.] Conceding the Common Law rule, that upon the dissolution of a corporntion, the debts due to and from it are extinguished, still, it is competent for the Legislature to interpose and prevent such a result; and having done so, it is not in the power of the Courts to render a judgment, contravening the declared will of the Legislature; any such attempt would be an excess of jurisdiction, which would render its proceedings certainly voidable, if not absolutely void.
- [9.] Where a subsequent Statute purports, by its title, to be amendatory of, several others which have preceded it, alterations in the body of the Act of those which had gone before, either by excisions, additions or substitutions, create no discrepancy between the Act and its title.

Debt, in Muscogee Superior Court. Tried before Judge WORRILL, June Term, 1855.

This was an action brought in the name of Richard Lane

vs. Alexander J. Robinson, for the redemption of certain bills of the Planters' & Mechanics' Bank of Celumbus. On the trial, Ragan, the assignce of the bank, stated that he did not know the amount of bills in circulation; had within his control about \$69.000; had received from J. A. Lee about \$75.000. Defendant proposed to prove what Lee said when he delivered up the bills. The Court refused to admit this testimony, and defendant excepted.

The transfer book was given in evidence, showing four hundred and twenty-five shares of stock transferred to defendant by H. L. Smith, as agent for other stockholders. fendant proved by the cashier, that defendant was absent from the State at the time these transfers were made; that when the semi-annual report was published, giving his name as a stockholder to this extent, defendant came to him and expressed surprise, and objected thereto; that witness told him it was done for the benefit of D. McDougald. ant and McDougald afterwards had an interview in presence of witness, when defendant told McDougald that stock must This was not done, howbe transferred to some one else. ever, until June, 1841, when the same was transferred by defendant to the bank. Defendant never took a certificate for this stock, or received any dividends thereon. At the time of the final failure of the bank, the circulation amounted to **\$228.946.**

S. R. Bonner testified: That he owned \$1500 of the bills sued on in this case; that he was one of the original stock-holders.

Defendant then proposed to prove that the original organization of the bank was illegal, and in violation of law and of the charter. The Court refused to hear the evidence, and defendant excepted.

WM. DOUGHERTY testified: That he knew of \$100.000 of bills in circulation, of which \$104.000 belonged to the Bank of Columbus. Defendant then gave in evidence the judgment of forfeiture against the bank, rendered at June Term, 1843.

Defendant then gave in evidence the deed of assignment to R. Alexander, and proposed to show that the assignee wasted the assets, which were amply sufficient to pay the liabilities. The Court rejected the evidence, and defendant excepted.

Defendant proposed to prove, that the bills held by the Bank of Columbus were received by them on deposit, under a contract with John Banks, James M. Chambers and A. H. Flewellen, three of the directors and large stockholders of the P. & M. Bank—they giving bond to redeem the same and pay interest on such deposit; and farther, that these bills were an excessive issue, in violation of law, and within the knowledge of the Bank of Columbus, who was particeps criminis in the said illegal issue; and consequently, these bills form no part of the outstanding circulation of the P. & M. Bank. The Court rejected this evidence, and defendant excepted.

The Court charged the Jury, that they "must be satisfied that the plaintiff is holder and owner of the bills sued on; that it mattered not if \$1500 of them did belong to S. R. Bonner, unless the defendant had pleaded and proved a good and legal set-off against the said Bonner; not having done so, the plaintiff must recover on that point." "You must also be satisfied that the defendant is a stockholder in the P. & M. Bank. The transfer book is evidence to that point." As to defence set up by defendant, as to the shares transferred to his name without his consent, the Court said: "The duty which the defendant owed to himself and the public, required that he should have had it immediately cancelled; and if you believe he did not do so, then he is liable for the same. Furthermore, the cashier was not the proper person to whom the defendant should have complained—to the President and Directors he should have gone, and repudiated the transfers, and had the matter set right. If he did not do this, and suffered his name to be published again and again as the owner, he is liable on the stock as if he were the owner."

"To ascertain the liability of the defendant, you must determine the amount of his stock. If that amount exceeds

the bills sued on, you will find a verdict for the whole amount of the bills, with interest from the time of filing the declaration."

To each and all of these charges, defendant excepted.

Defendant requested the Court to charge, among other things, as follows:

- 1. That the stockholders, if liable at all, are held and bound in proportion to the number of shares, and the value thereof, owned by each; that the plaintiff must prove the amount of his liability, in order to recover. The proportionate liability of defendant can only be ascertained by ascertaining the whole liability of the bank at this time.
- 2. That if the Jury believe that defendant was not, in fact, the owner of the 475 shares transferred to him, then he is not liable on said stock, unless the plaintiff shall prove that the defendant allowed the stock to remain in his name, to defraud and deceive the public.

The Court declined to charge as requested, and defendant excepted.

B. HILL; H. HOLT; S. JONES, for plaintiff in error.

W. DOUGHERTY, for defendant in error.

The Court not being unanimous, the Judges delivered their opinions seriatim.

By the Court.—LUMPKIN, J. delivering the opinion.

I propose to write a brief opinion in this case, not because the points adjudicated are unimportant, but for the simple reason that a decision in these bank cases settles nothing. I am warranted in saying this from the experience of the past six years. With every change in the Court, the same questions are re-produced for re-adjudication. And we are authorized to infer, that this practice, so subversive of the fun-

damental object for which this tribunal was organized, is to continue so long as this litigation shall last. Why should I or any other Judge, under these circumstances, spend his time and strength for naught?

[1.] The first error assigned, is in ruling out the testimony of Ragan and Bonner, as to the illegal and fraudulent organization of the Planters' & Mechanics' Bank of Columbus, and the participation therein of Bonner.

Counsel for defendant in error confess that the Court was wrong in excluding this evidence, and state, by way of explanation, that the decision of this Court in Anne E. McDougald, adm'x, vs. Bellamy, adm'r of Bailey, at Americus, July, 1855, was not known when the bill of exceptions in this case was certified.

[2.] Was the Court right in rejecting the sayings of Lee, when he delivered a packet of the bills of the bank to Ragan, the assignee, showing from whom and where he obtained them? We think not, and upon the authority of Lockhart & Thomas against McNabb, decided last summer, and not yet reported.

Here the main fact is the delivery of the money by a third person to the assignee. Without something explanatory, the transaction is unintelligible. Should not the concomitant declarations of the actor, Mr. Lee, be received as to the place where, and the person from whom, he obtained these bills, as well as the directions given as to the disposition to be made of them? Admit this proof, and the transaction is illustrated and understood. Reject it, and it is stultified. We see the packet handed over, but for what purpose or with what intent, we are left in utter darkness.

[3.] Once concede that the amount of the outstanding circulation is a necessary element in ascertaining the stockholder's liability, and we hold that it is; and it follows, of course, that every inquiry is legitimate and proper which aids in the investigation of that fact. It is argued, with great earnestness, that to permit these collateral issues, is to defeat the possibility of a recovery; and consequently, is a practical

denial of justice. At this distant day, since the bill-holder's right to sue accrued, it may possibly have the effect of driving him into Equity, or even out of Court. That is not the fault of the law.

But what insurmountable obstacle exists in this case more From first to last, there has been a factithan in others? tious importance attached to these bank cases, which does not intrinsically belong to them. What are they more than others, either in principle or dollars, that they should disturb the equanimity of the Court, and compromit its dignity by the petty personalities of Counsel; that they should consume, to such an unreasonable extent, the time of the country; that they should be invoked to make and unmake Judges, and convulse the State from one end of it to the other? fund of an insolvent is to be distributed—what a number and variety of issues must be formed, before the quota to which each creditor is entitled can be ascertained? But a suit at Law against an executor or administrator, is a strictly analogous proceeding. The trustee is sued by a creditor of the testator or intestate. He pleads, amongst other things, outstanding debts against the estate, of equal or higher dignity, of which he has been notified. Have not each of these claims to undergo a legal investigation, before a judgment, quando or præter, can be rendered? And yet, this is a practice of daily occurrence in our Courts. We have no doubt the difficulty of determining the outstanding circulation is greatly exaggerated in the imagination of Counsel. But be this as it may, the principle is a plain one.

(4.) As to the 475 shares upon which it is sought to make Robinson liable, the evidence shows that this stock was transferred to him without his knowledge or consent, and without consideration; and that if he held it all, it was for the benefit of McDougald. Robinson, therefore, can only be made liable on the ground of fraud. If the Jury should believe, from the proof, that after the fact was brought to his knowledge, that the stock stood in his name, he acquiesced in the transfer for the accommodation of McDougald, then he is presumptively

liable for the bills issued, before he re-transferred the stock to the bank; and, prima facie, he is not liable on bills issued after that time.

Fraud is a question of fact, to be deduced by the Jury, in this as in all other cases, from all the circumstances connected with the transaction.

The transfer book, we think, was properly admitted to go before the Jury. And its materiality was strengthened in this case, inasmuch as Robinson subsequently re-conveyed to the bank—thus acknowledging, that by virtue of the transfer, the legal title to the stock was in him; and that the bank recognized him as the owner. We do not intend to say—indeed, our opinion is to the contrary—that had Robinson stood aloof entirely from the business, that the mere fact of the stocks being transferred to his name, would, per se, have involved him in any liability whatever.

(5.) We hold there is error in the next assignment, as to the extent of the defendant's liability. It is the opinion of this Court, that the aggregate body of stockholders, are liable under the charter, for all the bills issued by the bank; and that the liability of each is to be ascertained and fixed by the following proportion, namely: as the whole capital stock is to the entire outstanding circulation, so is each stockholder's shares to his part to be redeemed.

We think there can be no doubt but that it was the intention of the Legislature to make the stockholders ultimately liable to redeem all the bills or notes issued by the bank. Such is the very language of the charter. Grant this and the argument is at an end; for it follows irresistibly, that each stockholder's liability to take up the unpaid bills of the bank, is in proportion to the number of shares which he holds of the capital stock. For myself, I never felt clearer in any conclusion.

Having thus succinctly disposed of the five grounds upon which the judgment of the Circuit Court must be reversed, we shall, with all possible brevity dispatch the remaining points in the record.

Robiuson w. Lane.

[6.] Was it error in the Court to disallow proof as to whom the bank recognized as the owner of the 475 contested shares of stock in the bank? Had the proposition have been to show that dividends were paid to Robinson, or that he voted as a stockholder, or performed other acts upon the faith of those shares, the question would have been different. We have already said that the bank treated him as the legal owner, by taking his assignment. But this was an act. We do not see by what rule we could let in the declarations of the bank, through its agents and officers, to the prejudice of third persons.

[7.] How far are bill-holders to be affected by the assignment made by the bank and ratified by the Legislature? The position occupied by Counsel for the stockholders is, that if assets sufficient in amount and value, were turned over to the assignee to redeem the circulation, and the same have been wasted, the stockholders are discharged.

It might well be questioned, whether the assignment made by the bank ever was accepted by the bill-holders, in the legal sense of that term. But conceding that it was, the bill-holder, as the evidence shows, pursued his remedy at Law, upon his judgment against the assignee, to every available extent; and the proof of this is, a return of nulla bona on the fi. fa. by the proper officer for executing the same. And having done this, and the bill-holder under the charter having a speedy, direct and certain redress against the stock-holder himself, the latter cannot require the former to look to any other source for payment. This point is virtually covered by Lane against Thornton, (11 Ga. R. beginning at page 518 et sequitur.)

But it is argued by Mr. Hill with his usual ability, and who raises no question as to the validity of the assignment, that the bill-holders having, by their neglect, suffered the corporate effects to be lost, the stockholders who occupy the position of sureties, are discharged, and much authority is cited in support of this proposition. But no precedent has

been produced, and none, I feel quite certain, can be found which comes up to this case.

I admit, that if property be assigned by the principal debtor, directly to the creditor, and it be wasted, there would be justice in the claim set up to exoneration, by the surety. But here the assets are transferred to a third person-one chosen and selected by the corporation, and over whom the the stockholders had equal power (I doubt not, in fact, far more) with the bill-holders, if not by the form of the deed, vet, by operation of law. The stockholders were not only interested in seeing this fund properly applied to discharge the primary liabilities of the bank, but they were entitled to the residuum should there be a surplus. Why did they not come into Equity and complain that Alexander, the assignee, was not discharging his duty? That he was suffering the assets to be squandered; and that in consequence thereof, they were likely to be damnified? On the contrary, no fault is found-no complaint heard. Judge Sturges, we are told in the argument, held that the Legislature had no power to save the debts due to and from the bank from extinguishment; that the debtors of the bank had a constitutional right which could not be impaired, of being released from the performance of their obligations. And that Judge Alexander treated the whole matter, assignment and all, as a nullity: and hence, refused to execute the trust which he voluntarily assumed.

And thus, funds now alleged to have been amply sufficient to satisfy all these demands, were permitted to be wasted. And the doctrine is, that the bill-holders, with no notice by the stockholders to look after this property, and with co-ordinate power to do so themselves, are barred from pursuing: their statutery remedy!

[8.] The next error assigned is, the refusal of the Court to charge the Jury, that by the judgment of forfeiture, thedebts due by the bank were extinguished.

This Court having repeatedly, within the last six years, assigned reasons for entertaining the same opinion as that

Robinson ra. Lane.

held by our brother WORRILL upon this point, I am content to rest my judgment of affirmance, in the present case, upon the past argument. (8 Ga. Rep. 468; Ib. 486; 11 Ib. 458; 16 Ib. 289.)

My mind has never wavered for a moment upon this question, whether considered upon general principles or upon our own special legislation relative to the subject.

In Thornton vs. Lane, (11 Ga. Rep. 493,) in speaking of the odiousness of the antiquated Common Law rule, that upon the dissolution of a corporation, the debts due to and from it are extinguished, and which, thank God, I have lived to see itself extinguished, by an authority not subject to review, I remarked that "Georgia is not obnoxious to this reproach, so far as this corporation" (the P. & M. Bank of Columbus) "and others in its vicinity, in pari delicto, are concerned. She has made ample provision to rescue them from the operation of this rule."

Let us glance, for a moment, at some of the enactments upon this head. I shall not attempt an analysis or collation of all of them.

The Act of 1840 (Cobb, 115) contains this explicit provision: "And in case any of said banks, their branches or agencies, shall then and thereafter" (that is, after the 1st day of February, 1841,) "fail or refuse to comply with and perform the requirement aforesaid promptly," (pay specie on their bills.) "then his Excellency, the Governor, on due proof thereof, is hereby authorized and required to cause judicial proceedings to be instituted, forthwith, against such defaulting bank, in the Superior Court of the county where the same is located, to the end that the charter of such bank may be declared as forfeited and annulled; and that the assets of the same be immediately placed into the hands of a receiver, under adequate security, for the benefit of the creditors thereof."

Under this Act, judicial proceedings were instituted against the P. & M. Bank, to forfeit its charter, on account of its failure to redeem its notes in specie. But as hope was held

Robinson rs. Lane,

out that the bank would resume specie payments, in the winter of 1841, another Statute was passed authorizing and requiring the Governor to arrest the prosecution, provided the bank would commence to redeem its liabilities by the 1st of January, 1842, and should continue to do so thereafter. (Cobb, 117.)

But the promise of resumption proving delusive, the Legislature again, in 1842, enacted that, "in all cases where ju--dicial proceedings had been commenced by the State against this and other banks, which had become amenable to the provisions of the Act of 1840, and which had failed to comply with the requirements of the Act of 1841, upon the final trial of such proceeding and the rendition of a verdict. upon which a judgment of forfeiture should be pronounced, the Judge should pronounce the judgment of dissolution for all purposes whatsoever, saving and excepting as to its power, in its corporate name, to collect and pay its debts, and to sell and convey its estate, real and personal, which power should be exercised by the receiver or receivers, whose appointments are herein provided for, in the name of said corporation, subject to no control whatever by the corporation or its officers. No inference can properly be drawn from this nor any other expression, in any of these Acts, adverse to the stockholders' right to interfere, legally, to protect their inter-Their right to do this, resulting from their liability under the charter, could not be divested, even by the Legislature, had it been attempted. And it was made the duty of the Governor, on being notified thereof, by the Judge before whom the case was determined, to appoint three competent persons as receivers, whose duty it should be to take charge of and collect, as early as practicable, the debts and demands due and owing to said bank; and to pay off and discharge its liabilities, and to turn over the balance of the assets to the stockholders, in proportion to the amount of stock held by them." (Cobb, 118, 119.)

In May, 1843, just before the judgment of forfeiture was rendered, the bank made a regular assignment of all its pre-

perty, real and personal, and of all its debts, credits and effects, for the benefit of all its creditors. And no receiver having been appointed by the Governor, under the Act of 1842, because none could be found willing and competent to act, the Legislature at its next session in December, 1848, ratified and confirmed the assignment made by the bank, declaring that it should be taken, held and considered, valid for all purposes, both in Law and in Equity. And the assignee, Robert B. Alexander, was authorized to sue and be sued, in his said character, for any demand due to and from said corporation. (Cobb, 120, 121.)

And yet, in the face of all this legislation and of this assignment by the bank, before its charter was forfeited and of the legislative confirmation thereof, it is insisted that the liabilities of the corporation, and consequently, the personal liability of the stockholders, is extinguished! and wherefore? Suppose it be true that the debtors of the bank, and the stockholders contracted in reference to the Common law rule? Is it not equally true that they contracted also in reference to the acknowledged right of the Legislature to rescue the assets from this principle? And is not the one to be taken as much an element of the contract as the other?

But while it is not disputed that the Legislature had the power to interpose and prevent the operation of the Common Law rule, and that they have exercised the right, as is clearly shown in the foregoing quotations, yet, it is contended, that by the judgment of forfeiture, upon the quo warranto rendered against the bank, that all the debts due to and from the institution were extinguished.

I have endeavored, and I trust successfully, to demonstrate on a former occasion, that conceding this to be true, it does not affect or impair, in the slightest manner, the collateral undertaking of the stockholders under the 11th section of the charter. (16 Ga. R. 289.) I am content to submit that opinion, and upon it my judicial reputation, to the test of time and the scrutiny of the professional world, and to be judged accordingly.

But waiving this view of the subject, what was the judgment of the forfeiture pronounced by the Superior Court of Muscogee County, against the Planters' & Mechanics' Bank of Columbus? It is in these words: "It is considered by the Court, that the liberties, privileges and franchises, to-wit: that of being a body politic and corporate, by the name and style of the Planters' & Mechanics' Bank of Columbus, heretofore used, enjoyed and exercised by the defendant, be seized into the hands of the State, and that the said defendant do not, in any manner, hereafter intermeddle, use, have, enjoy or exercise, any of the liberties, franchises or privileges of a body politic or corporate, but that the defendant be absolutely prejudged and excluded from holding, using or exercising any of the privileges, franchises or liberties of a body politic or corporate, and that the State recover its costs, to be taxed." &c.

Suppose it be true, that apart from the Acts of 1840, 1841, 1842 and 1843, the debts due to and from the bank would have perished with the corporation, how can it be pretended that they are not saved by the Statutes? Does this judgment assume to disregard the law, as has been suggested, on account of its supposed unconstitutionality? We deny that it admits of any such construction; and we must interpret it by itself, and not from tradition. We hold that the judgment is precisely what it should have been, both in form and substance.

The Act of 1840 directed a judgment of forfeiture to be rendered against this and other defaulting banks, upon failure to pay specie at a stipulated period. But the same Act rescued the assets by providing that they should immediately be placed in the hands of a receiver. The Act was silent as to who should appoint the receiver; and therefore, a question may have been raised as to the necessity of the further action of the Court. But the Act of 1842 removes all doubt or difficulty upon this point. A judgment of dissolution was to be pronounced for all purposes whatsoever, saving and excepting as to the power of the bank, in its corporate name,

to collect and pay its debts, &c. which power is to be exercised by a receiver, to be appointed by the Governor, upon being notified by the presiding Judge that the charter has been judicially annulled.

And was not just such a judgment rendered? recalled to the State all the liberties, franchises and privileges which had been granted to the bank, and leaving the debts due to and from it untouched? The form of the judgment was not prescribed by the Act, and it never was contemplated that it should, in so many words, save and except the liabilities of the Bank from its operation. Hence, it makes no attempt to do this. It would have been a work of supererogation. This had been expressly and effectually done by the several Statutes passed for this purpose. The judgment fulfilled its mission in dissolving the charter. custody and collection of the debts were committed to a receiver not appointed by the Court, but by the Governor, not deriving his authority from the judgment of the Court, but from the Statute.

We respectfully submit, then, that an attempt is made to wrest this judgment from its legal import, and to attribute to it a meaning and effect never contemplated. Were it otherwise, it was not in the power of the Court to award a valid judgment in contravention of the law. A judgment of a Justice of the Peace for fifty dollars, under the old law, or one hundred under the new, would be void for want of jurisdiction; for where a judgment is beyond the jurisdiction of the Court rendering it, it may be treated as a nullity in a collateral proceeding.

But suppose I am wrong in all this, could there be any doubt, that under the Acts set forth, the judgment might be set aside and a new judgment awarded in conformity with the law? I insist, however, there is no occasion for this. The judgment is right, and it is doing violence to the obvious design of the Legislature and the Court, to undertake to pervert it to the purpose claimed for it.

Suppose just such a judgment was now rendered upon a

passed—would it be pretended that the corporate debts were extinguished? And why not? Why were not the Acts of 1840 and 1842, as much the law, as to this corporation, as the Act of 1855—'56, is now to corporations generally? The late Statute simply repeals the Common Law rule as to defunct corporations. Was it not set aside by the Acts of 1840—'42, as to this bank? Why, then, should a general judgment of ferfeiture, without any saving as to the debts, operate differently in the two cases?

I must think that examination and reflection will eventually conduct us to but one conclusion in this case. That such was the cotemporaneous construction put upon the judgment of forfeiture, is evident from this fact. Suits at Law, under the Statute, were brought against Judge Alexander, as assignee of the bank, by the bill-holders. He was a gentleman of high professional standing; and yet, he submitted to have judgments go against him, without opposition. And these judgments are made the foundation of the suits, at this day, against the stockholders; and it will not do to say, by way of explanation, that he was sued as assignee under the deed, and not under the law. As assignee under the deed merely, no action at Law could have been brought against him. And no one knew this better than he did.

Before dismissing this branch of the case, I would take occasion to remark, that more than once during the discussion of these bank cases, Counsel have portrayed in vivid colors the hardship of enforcing the individual liability clause against the stockholders, when by the judgment of forfeiture, they were deprived of the means of meeting and discharging the indebtedness of the bank. But by reference to the Acts, it will be seen that no such injustice is ascribable to the Legislature. The provision for collecting the corporate assets was co-extensive with that for paying its debts. And if any debtor of the bank has escaped, upon the ground that his liability was extinguished, the fact has not been brought to the knowledge of this Court. Indeed, it is more than intimated

—it is distinctly stated in this discussion, that the assignee suffered the debts to be lost, because he did not see fit, for reasons satisfactory to himself, to enforce their payment.

[9.] The only remaining question is, as to the constitutionality of the Act of 1843. The objection is, that the body of the Act does not correspond with its title. We are unable to detect the discrepancy.

The Act of 1840 was to compel the several banks to redeem their liabilities in specie; and to provide for the forfeiture of the charters of such as might refuse. The Act of 1841 was to arrest judicial proceedings and grant further time for resumption. The Act of 1842 was simply amendatory of these two; and the Act of 1843 was amendatory of all three—and such only is its title. Where is the repugnancy? Does not the Act effect what its title indicated? Instead of the Legislative assignment and its execution by a receiver, to be appointed by the Governor, as directed by the Act of 1842, the Act of 1843 ratifies the assignment by the Bank and substitutes the assignee therein named, in the place of the receiver, as contemplated by the previous law. Instead of discord, we see nothing but the strictest harmony and conformity between the Act of 1843 and its title.

McDonald, J. concurring.

The judgment of the Court below, in this case, is reversed on several of the assignments of error, by the unanimous judgment of the Court. Two of the assignments of error are overtuled by the unanimous judgment of this Court, and there is an affirmance of the judgment, by a majority of the Court, on

two other assignments—one of the members of the Court discenting.

The two assignments of error on which the Court disagree,

First. In the rejection by the Court of the testimony of M. Robinson, as to the value and amount of the assets turned over to the assignee, and the waste thereof by the assignee.

Second. The refusal of the Court to charge the Jury, that by the judgment of forfeiture, the debts due by the bank were extinguished.

It is not necessary that I should discuss any other matter in the case, than the points on which the Court disagree. I will consider, first, the last of the two above stated assignments.

I have no doubt, that according to the Common Law, onthe civil death of a corporation, its debts are extinguished, and I have as little doubt that the Legislature has power to prevent that effect. A corporation is factitious; and if the power which creates it, in the act of its creation, or by subsequent constitutional enactment, makes no provision for preserving and continuing the debts due to and from it, on its absolute dissolution, they perish with it—they become extinct.

If the charter of the Planters' & Mechanics' Bank was repealed or annulled, and the corporation was absolutely dissolved thereby, unless they have been prevented by competent constitutional legislation, the consequences ensue to which I have adverted.

The important question in this case then is, was the corporation absolutely dissolved by the judgment pronounced? And if it was, have the debts due to and from it been saved from extinction by the Legislature?

In considering the effect of the judgment, I will inquire— 1st. Into the origin of the proceeding and its objects.

- 2d. What was the proper judgment under the proceedingsinstituted?
 - 3d. The nature of the judgment pronounced?

4th. Whether the judgment operates as a forfeiture, without execution of it?

1st. What was the origin and object of the proceeding instituted against the Planters' & Mechanics' Bank of Columbus?

Prior to the meeting of the General Assembly in 1840, some of the banks of this State had suspended specie payments. The Legislature, at the session of that year, made it the duty of the Governor to issue his proclamation, requiring suspended banks to resume specie payments on or before the first day of February thereafter, and on the refusal or failure of any bank to do so, and on due proof thereof, to order judicial proceedings to be instituted forthwith against it to the end that the charter might be declared as forfeited and annulled, and that the assets of the same be immediately placed in the hands of a receiver, for the benefit of the creditors thereof.

The suspension of specie payments by the bank, and its continuance in a state of suspension, were considered such abuses of its franchise as called for the interposition of the Government to protect the people from a worthless currency. The Legislature, however, did not intend to inflict the great evil on the community that would have followed the extinguishment of the debts due to and from the defaulting bank; and therefore, by the strongest kind of implication in the Act of 1840, repealed the Common Law principle adverted to, by providing that on the judgment of forfeiture, the assets should be immediately placed in the hands of a receiver, for the benefit of the creditors.

The General Assembly of 1842, declared its intention still more emphatically, and it may be said, repealed this principle of the Common Law in these cases, by enacting that on the rendition of a verdict on which a judgment of forfeiture should be pronounced, the Judge should pronounce a judgment of dissolution of said corporation for all purposes whatsoever, saving and excepting as to its power, in its corporate name, to collect and pay its debts, and to sell and convey its estate,

real and personal. Hence, it was not only intended, but actually provided by the Legislature, that notwithstanding a judgment of forfeiture should be pronounced, the relation of debtor and creditor between the bank and its debtors and creditors, should not be interrupted; that there should be no reversion of the real estate to its grantor, and that its personal estate should be applied to the payment of its liabilities.

There can be no question of the validity of these Statutes. The Legislature had the constitutional power to pass them. It had control over the subject. Indeed, proceedings for dissolving a corporation or seizing its franchises, must be instituted by authority of the State. (5 Mass. Rep. 230.) A corporation may be dissolved for some purposes; that is, in part, and in such cases, in England, it may be renovated by a new grant from the King. (The King vs. Passmore, 3 Term. Rep. 241.)

The proceeding had its origin with the Legislature, and its object was, to deprive the bank of its franchise; and while it did that, to protect the community against the effects of a total dissolution, under the rules of the Common Law, upon its debts.

What was the proper judgment, then, on a verdict against the bank, on proceedings instituted under the foregoing authority?

The proceeding adopted by the State's officer against the bank, was just such as was best calculated to carry into effect the legislative intent. An information in the nature of a quo warranto, was filed against it. What is the proper judgment on such a proceeding?

A quo warranto is the remedy where there is a body corporate de facto, who take upon themselves to act as a body corporate, but from some defect in their constitution, they cannot legally exercise the powers they affect to use. (3 Durn. & East, 244.) Prosecution by information, in the nature of a writ of quo warranto, is substituted for the tedious and protracted proceeding by writ of quo warranto.

The process is speedier, and the judgment not quite so decisive. It is applied to the mere purpose of trying the civil right, seizing the franchise or ousting the wrongful possessor. (3 Bl. Com. 263.) The judgment is, that the parties be ousted, and the franchises seized into the hands of the Government. (2 Kent, 313.) If the party has continued in possession of the liberty by wrong, the judgment is, that he shall be ousted; but if he once had title and loses it, the judgment is, that the liberty shall be seized. (Yelverton's Rep. 192.) The judgment in the case of the City of London, was a judgment of seizure into the hands of the King, and the corporation was not thereby dissolved, for such judgment neither dissolves nor extinguishes the body politic. (4 Modern Rep. 58.)

Mr. Grant, in his able treatise on the law of corporations, after an elaborate analysis of the authorites on this subject, states as one of the principles to be deduced therefrom, that for the purpose of punishment, short of annihilation, the proper proceeding where a corporation either abuses its undoubted liberties, franchises, &c. or usurps new liberties, &c. not granted in its charter, is an information, by the Attorney General, in the nature of quo warranto, where the judgment for the Crown will be seizure into the hands of the Crown.

This is to be adopted, where the object is punishment by deprivation of corporate rights for a time, not the total and final deprivation of these rights. (Grant on Law of Cor. 301.) The judgment rendered in this case, is a judgment of seizure into the hands of the State. It is in conformity to the law in such cases. "Where it appears that the King or his ancestors, have once granted a liberty, and the liberty is forfeited by mis-user or non-user, the judgment shall be, that it be seized into the King's hands." (2 Kyd on Cor.) "In cases of abuser or non-user of a franchise, once lawfully granted, the King resumes that which originally flowed from his bounty; and this course, it has been said, is most beneficial to the subject, who, though by forfeiture, mispleading or default, he may lose his liberty, may have recourse to the

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King's mercy for restitution." (1b.) Where it appears that a liberty is usurped by wrong, exercised on no title, by the King's grant or otherwise, judgment of ouster, only, should be entered. (1b.) The proceeding in this case, was not the proper proceeding to annul the charter. It was a proceeding on which a judgment of seizure alone could be entered. The judgment rendered, was the usual judgment of ouster, including a judgment of seizure. (2 Kyd on Corp. 407; 8 Cowen's Rep. 721; Grant on Cor. 298, note q.) The judgment in the case, as rendered, does not destroy the corporation. It is in conformity, also, to the legislative intent, that it should not have that effect.

It will be necessary to say but little on the next ground, as to the nature of the judgment pronounced, having had occasion to say so much on that subject.

It is insisted that the judgment rendered, dissolves the corporation. I have shown that an information in nature of a writ of quo warranto, is not the proper proceeding against a corporation to dissolve the charter, and that the judgment therein is a judgment of ouster or seizure.

If the members of a corporation have abused their liberties. as granted in their charter, and it is desired to annul the corporation, the proper proceeding for that purpose is by scire (Grant on Cor. 801.) The judgment in such case is, that the charter granted to the corporators, that they should have the franchises, privileges, corporate rights, &c. in the charter granted, be revoked, vacated, annulled, and be held vacate, invalid, and taken for wholly null, &c. &c. In such a case, the lands of the corporation, on its dissolution, revert to the donor; debts due to and from it are extinguished, and its personal estate vests in the State or the people. I know of no exception to this except in the case when "a prior grantor brings a sci. fa. in the name of the State in respect of something which, having first been granted to him, is subsequently granted, in whole or in part, to another." (Grant on Cor. 45.) In this last case, the judgment should

proceed further, and add a clause of seizure into the hands of the State that it may be preserved for the prior grantee.

It is argued, however, in this case, that the judgment dissolves the corporation, and that inasmuch as the Court didnot render the judgment, with the exception expressed in the Act of 1842, or rather because the exception expressed in the Act is not incorporated in the judgment, the debts of the bank are extinguished by the judgment—and it is stated to have been the opinion of the Judge who rendered the judgment, that the exception in the Act was unconstitutional: and that therefore, it was purposely omitted in the judgment.

These things do not appear in the record. They are altogether traditional. We must act upon the judgment as it is, and determine its legal effect as it stands in connection with the whole proceeding and the law. It seems to me that if the presiding Judge had considered the Act as prescribing the form of the judgment, he would have conformed to it as far at it was in his opinion constitutional. The Act of 1840 declares that the proceedings should be instituted, to the end that the charter of the bank may be declared as forfeited and The Act of 1842 declares that the Court "shall pronounce the judgment of the dissolution of the said corporation for all purposes whatsoever." Then follows the excep-The judgment pronounced does not declare the charter forfeited and annulled, nor does it adjudge the corporation dissolved for all purposes whatever.

It adjudges, 1st. That the liberties, privileges and franchises, to-wit: that of being a body politic and corporate, by the name and style of the Planters' and Mechanics' Bank of Columbus, heretofore used, enjoyed and exercised by the defendant, be seized into the hands of the State.

- 2d. That the said defendant (treated as an existing, undissolved body) do not, in any manner hereafter, intermeddle, use, have, enjoy or exercise any of the liberties, privileges or franchises of a body politic or corporate.
 - 8d. That the defendant be absolutely forejudged and ex-

Robinson ze. Lane.

cluded from holding, using or exercising any of the privileges, franchises or liberties of a body corporate or politic.

I will not pause to inquire whether this judgment affects the grantees of the franchises, &c. It is their grant and contract that were moved against. If it did, it amounts to no more than a judgment of seizure of the liberties, franchises, &c. into the hands of the State, and that the bank be prohibited from using any of the franchises, &c. conferred on the grantees in the charter, and from intermeddling therewith. But granting that by its terms it affects the rights of the grantees, to what extent does it affect them?

The judgment is on an information in the nature of a quo Mr. Grant, in his treatise already referred to. says that the proceeding by sci. fa. appears to be the only adverse legal proceeding by which the corporation can be finally annulled, for the effect of a judgment of seizure into the hands of the Crown, of the liberties, franchises, &c. followed by actual seizure, accordingly does not, of itself, operate to annihilate the corporation, which may, at any time, be restored and revived by the Crown. (295, 297, note o, 301.) What becomes of the assets, debts and liabilities of the corporation upon the seizure? In England, the Crown, upon seizure of the franchise, appoints a custos, who discharges all the functions, duties, &c. of the corporation, until the restitution of the liberties, or revival of the corporation. (Grant on Cor. 302.)

But laying aside all the learning on the subject of corporations, their dissolution, &c. to be derived from the authorities, and our Statutes settle the whole matter. If the Common Law had established a rule that, on the civil death of a corporation, its estate, real and personal, and its assets, should be vested in a custos or receiver, to be appointed by the Crown or the Court, who should sell the estate, collect the assets and pay the liabilities of the corporation, the debts, of course, would survive the dissolution. Our Statutes are surely as potent as the Common Law; and if there is any

Robinson re. Lane.

thing in language, they save the debts of this bank from extinction.

It is scarcely necessary to consider whether the judgment can operate as a forfeiture, without an execution of it. I think it cannot. "After judgment, the regular course is, to issue a writ of seizure to the Sheriff, which, after reciting the proceedings in the quo warranto, commands him to seize the liberties into the King's hands." (2 Kyd on Cor. 409.) But this writ, says the author, in point of fact, has not always issued. That the writ has not always issued, by no means establishes the law to be, that the forfeiture is complete without it.

If the defendant is in Court when the judgment is rendered against him, to restore the patent into Chancery, no process is necessary, unless he refuses to bring in the patent. It is in such cases, I apprehend, that no execution is issued.

If the patent, which is avoided by the judgment, belongs to a corporation, a distringues is the proper process to compel them to bring it in to be cancelled. (Hindm. on Patents, 425; Grant on Cor. 44, note S.)

But how is a judgment to be executed here, where the charter is a public law, all our Statutes being, by express enactment, public Statutes? It cannot be brought into Court to be cancelled. In England, it is said that patents or charters granted by the Crown, by direction of Parliament, cannot be set aside or repealed by the judgment of a Court. charter granted by Parliament, cannot be repealed or changed but by Act of Parliament. (Grant on Cor. 10.) All charters in this State are by Statute, and they are by Statutes irrepealable, at least in the first instance. They are irrepealable because. after acceptance, they become contracts, and the State canpass no law which impairs their obligation. Hence, to adopt the rule above stated, charters, in this State, could never be interfered with by any kind of proceeding. It is not necessary to adjudicate any thing in regard to that matter in this I will, nevertheless, say, that a rule might be adopted

here to accomplish the object of repeal without interfering with the principles of the Constitution. The only impediment to Legislative repeal, is the constitutional provision to which I have adverted. The Judiciary has no power, by any kind of proceeding, to repeal a Statute, but it has power to rescind a contract on legal principles.

The ground on which charters are forfeited, is that a corporation cannot be allowed to take a grant and repudiate the conditions on which it is made; and therefore, a breach of the conditions, is punished by withdrawing the grant.

A judgment of forfeiture annuls the contract and removes all constitutional difficulties from the subject, and the Legislature may then repeal the charter without encountering the prohibition of the Federal Constitution.

The conclusion to which I have come is, that the Court below was right in refusing to charge the Jury, that by the judgment of forfeiture pronounced in this case, the debts of the bank were extinguished.

The Court committed no error, in my opinion, in rejecting the evidence of M. Robinson in regard to the value and waste of the assets which had been turned over to the assignee.

The Act of the Legislature, by declaring the assignments legal and valid, to all intents and purposes whatsoever, only affirmed the Common Law on that subject. It was legal and valid without the Act. The Statute was not certainly intended to operate beyond its words. It cannot have the effect of fixing the assent of creditors to it, even if that affected the case.

The plaintiff in error is not a surety; he is a principal. It is true his liability is *ultimate*; but by accepting the charter, he assumed that liability as a principal. The bank is owned by the stockholders, and every stockholder assumed the same kind of liability; and if they are sureties, they are sureties for themselves.

But if they are sureties, the creditors are not affected by the waste of the assets by the assignee, who became receiver

by the Act of 1843. That Act was passed after the judgment, on the information against the bank. No receiver had been appointed, and no competent person was found who would accept the appointment. The assignee was converted into a receiver, and was invested with power to sue, and was subjected to suits at the instance of creditors.

It is not pretended that the creditors were parties to the assignment, when it was made; then what was the effect of the assignment as to the creditors? Did it constitute them cestui que trusts, as is contended? "A man who, without any communication with his creditors, puts property into the hands of trustees, for the purpose of paying debts, proposes only a benefit to himself by the payment of his debts; his object is not to benefit his creditor; it would therefore be a result most remote from the contemplation of the debtor, if it should be held that any creditor discovering the transaction, should be able to fasten on the property and invest himself with the character of a cestui que trust." (Bill vs. Cureton, (2 Mylne & Keene, 503.) The ratification of the creditors must be inferred from their own acts, and not from the acts of the debtor.

The Legislature cannot make contracts for individuals, and no assent of creditors to the assignment can be inferred from the Act of 1843. The object of that Act was to convert the assignee into a receiver, and to impose on him the duties and liabilities of that office. It was with him to acquiesce in or reject the responsibilities thus thrown upon him.

As we hear of no complaint from him, it is to be presumed that his conduct has amounted to an acceptance, which he is not now at liberty to withdraw. By that Act he stands in the place of the bank; he is its representative, except as to individual liability for the debts; he is to be sued instead of the bank. Does a suit by a creditor against him, amount to a ratification of the assignment? By the suit the creditors recognize the defendant as the assignee or receiver, but do not adopt the assignment in the sense contended for by defendant.

To obtain the benefit of the ultimate liability of the defendant, it is held that the creditors must show a judgment and execution against the bank or the assignee, who is, as receiver, its representative, with a return of "nulla bona." But it is contended, that by using the only possible means to enforce their rights, they forfeit them. Such a position cannot be supported. The assignee is not the agent of the creditors; he is not subject to their contract; he was made assignee without consultation with them; they have relinquished no right which they had against the bank or stockholders, by suing him; the bank might have been sued by them notwithstanding the assignment; they have neither directly nor indirectly, in consideration of the assignment, released the bank from liability; the bank could not plead in bar the assignment; the creditors cannot be forced, by the debtor, now that we have no bankrupt law, to accept an assignment in satisfaction; this can be done by contract alone, and there is no contract, express or implied, demonstrated by the evidence, which discharges the bank or stockholders from liability, in consequence of the assignment. not the case of collaterals, pledged to a creditor for the payment of his debt, and he loses them by negligence. waste of assets by an executor, given him in trust for the payment of debts, does not relieve a security for a debt, though the creditor may have exhausted all legal and equitable remedies against the executor.

The Court, therefore, in my judgment, very properly rejected the evidence of the amount of assets assigned.

Benning, J. dissenting.

In this case, a number of decisions were made by this Court. In all of them, except three, I concur. Those three are—First, as to the nature and extent of the liability which the eleventh section of the charter of the Planters' & Mechanics' Bank of Columbus imposes on the stockholders in that bank. Secondly, as to the effect, if any, which the trustee's wasting the property assigned to him by the bank, to be applied to the payment of the debts of the bank, had on the liability imposed by the section aforesaid, on the stockholders in the bank. Thirdly, as to the effect, if any, which the judgment of forfeiture rendered against the bank, had on the said liability imposed on the stockholders.

The reasons for my dissent from the first of these three decisions, have been pretty fully expressed in other cases, which have been before this Court. Referring to what I have said in Adkins vs. Thornton, a case argued at the same time with this, I dismiss the point as to the first of the three decisions.

My dissent from the other two of the three decisions, I cannot dispose of so summarily. I must give my reasons for it.

What, then, was the first of those two decisions?

On the 26th of May, 1843, the Planters' & Mechanics' Bank of Columbus, by deed, assigned to Robert B. Alexander, "all and singular the property, goods, effects, debts, dues, claims and all the other personal estate belonging to," said banks, "upon trust;" that he, as soon as he conveniently could, should make sale and dispose of "so much thereof, and such part thereof, as" was, "in its nature saleable, for the best price, in money, that" could "be reasonably had or obtained for the same;" and that he should "collect and get in so much thereof as" was "not, in its nature, saleable;" and that he should, in the first place, pay himself his expenses incurred in such sales and collections, as well as pay all other expenses that might be incident to "the execution of

the trust" in the assignment expressed; and then that he should "apply the residue of such trust moneys to the payment and satisfaction of the several sums of money due and owing by said Planters' & Mechanics' Bank of Columbus, to all the creditors of said bank, pari passu, and without any preference or priority of payment, other than such as" might "be prescribed by law."

The assignment contained no words of trust, in favor of the stockholders of the bank.

The assignment was made, shortly before the time at which judgment of forfeiture was rendered against the bank.

In the declaration, it is alleged that Adkins, the plaintiff therein, on the 16th of April, 1847, sued "Robert B. Alexander, assignee" of the said bank, upon the same notes on which that declaration against Robinson as stockholder, was founded; and that on the 10th day of Feb'y, 1848, he recovered "of said bank" the amount of the notes.

On the trial, Robinson proposed "to show assets remaining in the hands of Ragan," as succeeding assignee to Alexander; and also, proposed to show the amount of assets turned over to Alexander, under the assignment, in order to make it appear that a sufficiency of assets had been turned over to Alexander, to redeem the liabilities of the bank; and also proposed to show acceptance of the assignment by Adkins. As evidence of such acceptance, Robinson insisted that he had the right to rely on the terms and intent of the Acts passed by the Legislatures of 1842 and 1843, in reference to banks in a state of suspension; and on the fact that Adkins had, as aforesaid, sued Alexander as assignee.

The Court held that Robinson could not establish his point, unless he could show "an actual assent by the creditor—an implied assent not being sufficient." And to that decision, the defendant excepted.

The defendant also offered to prove, that Alexander had "wasted, misapplied and squandered the assets" turned over to him as assignee. This the Court also refused to let him do; but on what ground the refusal was put, the bill of ex-

ceptions does not state. And to that decision, the defendant excepted.

Were these decisions right? That is the precise question for my consideration.

The reason which governed the Court in the making of the latter of the two decisions, was probably the same as that which governed it in the making of the former of the two, viz: the notion that nothing short of "actual assent by the creditor," to the assignment, would be sufficient to make him a party to the assignment.

This is a narrow ground for the decision to rest on; and in the argument before this Court, the decision was placed on a broader ground, viz: that a waste of the assets by the assignee would be no defence to the stockholders, even if the bill-holders properly assented to the assignment. I shall, therefore, have to inquire into the validity of both grounds.

Is it true, then, that the assent of a creditor to the assignment, to be good, had to be "actual"; is it true that "implied assent" by a creditor, would not have been sufficient? I answer no. If the acceptance of a deed can be implied from facts, the acceptance is as good as it would be if it were express. Surely there can be no doubt of this.

And if an acceptance by acts will be sufficient, then, on a question of acceptance or no acceptance, any acts going to show acceptance, will of course be admissible as evidence.

Adkins brought suit on his bills against the assignee. This was an act from which it was certainly possible that the Jury might infer that he accepted the assignment.

So, the Act of 1843 declared the assignment to be valid. The assignment was made for the benefit of the creditors. A Jury might, therefore, conclude that the Act was procured by the creditors. But if the Act was procured by the creditors, then the Act is evidence that the creditors assented to the assignment.

Hence, I think that the ground on which the Court put its decision, was not a sufficient one. I proceed to the other ground.

If the trustee had wasted the assets, would that have been a defence to the stockholder, Robinson, against the bill-hold, er, Adkins, to the extent of the wasted assets?

In treating this question, I shall first endeavor to find what would have been the answer to it if no judgment of forfeiture had ever been rendered against the bank. Secondly, I shall try to find what is the answer to it, considering that a judgment of forfeiture has been rendered against the bank.

Supposing, then, that no judgment of forfeiture had ever been rendered against the bank, would a waste of the assets by the assignee have, to the extent of the wasted assets, constituted a defence to the stockholder, Robinson, against the bill-holder, Adkins?

Certainly not, if the assignment was itself invalid. And it was argued that the assignment was invalid.

The assignment contained no stipulation for the benefit of the stockholders in the bank. Its stipulations were for the benefit of the creditors of the bank.

In the Penal Code it is declared that all assignments "made by any bank in contemplation of insolvency, except for the benefit of all the creditors and stockholders, shall, unless made to an innocent purchaser for a valuable consideration, and without knowledge or notice of the condition of said bank, be fraudulent and void." (Cobb Dig. 797.)

But soon after the making of the assignment, the Legislature, by Statute, declared that the assignment should "be taken, held and considered valid for all purposes, both in Law and in Equity." (Act of 1848, Cobb Dig. 121.)

If this Statute was passed with the assent of the creditors and that of the bank, I suppose it will be admitted by all that the Statute was valid.

But the assignment was made for the benefit of the creditors, and the Statute was passed for the benefit of the assignment. It is to be presumed, therefore, at least until the contrary be shown, that the Statute was passed with the assent of the creditors.

So, as the bank made the assignment, it is to be presumed

that the bank wished the assignment to be operative. The object of the Statute was to make the assignment operative. It is to be presumed, therefore, that the Statute was passed with the assent of the bank.

I think, therefore, that notwithstanding the declaration aforesaid, contained in the Penal Code, the assignment was valid.

Assuming the assignment to be valid, what relation to it do the stockholders bear?

The assignment was made to secure the bills and other debts due from the bank.

By the eleventh section of the charter of the bank, it is declared that the stockholders in the bank, shall, according to a stated rule, be liable for the "ultimate redemption" of the bills of the bank. This makes the relation which the stockholders bear to the bills that of sureties. No liability that is no more than an ultimate one can be the liability of a principal. And every liability to pay a debt must be either that of a principal or that of a surety. There is no third sort of liability.

And (not to dwell on this point) this Court has repeatedly said that the stockholders under this clause are only sureties for the bills of the bank. (11 Ga. 517; 8 Ga. 478.)

This, then, is the relation which the stockholders bear to the assignment. They are sureties for the bills, to secure which the assignment was, in part, made.

Assuming, then, the stockholders to be but sureties for the payment of the bills, the question becomes this: Does a trustee's waste of property, assigned to him for the payment of debts, discharge the sureties to the debts, to the extent of the property wasted?

I say it does.

If property which is conveyed to secure the payment of a debt, is conveyed directly to the creditor himself, and he wastes it, the surety is discharged to the extent of the value of the property.

VOL XIX-47

This is a proposition which I believe nobody disputes. (Capel vs. Butler, 2 Sim. & Stu. 462; Law vs. East India Co. 4 Ves. 824; Maynew vs. Crickett, 2 Swans. 185; Theobald on Prin. and Sur. 143; Burge on Sur. 206.)

Indeed, in such a case, not merely is the surety discharged, but the principal also. (Williams vs. Price, 1 Sim. & Stu. 586; ex parte Mure, 2 Cox, 65.)

But if the property conveyed to secure the debt be not conveyed directly to the creditor himself, but be conveyed to a trustee for the creditor, and the trustee wastes the property, is the surety to the debt, in that case also, discharged to the extent of the value of the property?

And I say yes. I say that there is no material difference between the two cases; and if there is none, then whatever is law in the one case, must be law in the other.

To show, therefore, that there is no difference between the two cases, will now be my endeavor.

1. In the case in which there is a trustee, the creditor has, in reality, as much interest in the property, and as much power over it, as the creditor has in the case in which there is no trustee. In the former case, the creditor may compel the trustee to do with the property whatever, in the latter, the creditor can himself do with the property.

In the one case, the creditor has as much agency in the work of making the assignment, as the creditor has in the other. In neither is the assignment made until he accepts it.

In the one case may the creditor disregard the property in the hands of the trustee and compel the surety to pay up the debt; in the other, the creditor may equally disregard the property in his own hands, and compel the surety to pay up the debt.

But if, in these respects, there is no difference between the two cases, then, so far as the *creditor* is concerned, there is no difference between them in any material respect; for these are all the respects that are material.

2. And there is none, so far as the surety is concerned.

The surety has not, in the one case, any more power over the property, or any more interest in it, than the surety has in the other. In the one case, does the surety have, or not have, a resulting trust in such of the property, if any, as may remain after the payment of the debts; in the other, correspondingly, the surety has, or has not, a resulting trust in such of the property, if any, as may remain in that case, after the payment of the debts.

In the one case, has the surety the right to pay up the debts and take the place occupied by the creditor, with respect to the property; in the other, the surety has the same right.

In the one case, the surety has no more agency in procuring the assignment to be made, than in the other, the surety has in procuring the assignment to be made in that case.

In the one case, the surety has no more power to prevent the debtor and the creditor from agreeing upon the assignment, than in the other, the surety has to prevent the debtor and creditors from agreeing upon the assignment.

In each case, the effect of the creditor's accepting the assignment, is equally to destroy the surety's chances for procuring any assignment to himself for his indemnity.

But if, in these respects, there is no difference between the two cases, then there is no difference between them, so far as the surety is concerned, in any material respect; for these are all the respects which are material.

There is, then, no difference between the two cases, either as it regards the creditor, or as it regards the surety; and if so, what is law for the one must be law for the other. But for the one, that in which there is no trustee, what is the law is, that if the property be wasted, the surety is discharged; and therefore, for the other, that must, in like manner, be the law.

And with this, I might rest the point in hand; but as the whole argument of the defendant in error seemed to me to be placed on the assumption, that the stockholders would, under the assignment, have a resulting trust in such of the assigned

property as might remain after the payment of the debts out of the property, if any of it should then remain, it will be not amiss that I give some further notice to that aspect of the case.

I maintain, then, first, that in neither the case in which there is no trustee, nor in that in which there is a trustee, does or can any trust in the possible balance of the assigned property result to the surety. Secondly, that if such a trust did or could result to the surety, that would not be sufficient to make him answerable to the creditor for a waste of the property by the assignee.

1. Does or can a trust in such possible balance, result to the surety? I say it is most manifest that it cannot. The trust in such possible balance, must result to the principal—the person from whom such balance with the rest of the property, came. As soon as the debt is paid, the property remaining, if any, becomes freed of all claim on it by the creditor, and it, as a matter of course, goes back to the principal debtor—the person who assigned it—the person to whom it belongs. The surety, by that time, will have been set free; and so, he will have lost every vestige of a claim of any sort, as well against the principal or against the principal's property.

Suppose the bank had escaped forfeiture, and had paid up the debts, to secure which it made the assignment, would not the assigned property have gone back to the bank? Would it have gone to the stockholders? Who will say so? The assignment, it is to be remembered, contained no stipulation for the benefit of stockholders. (Hill on Trustees, 354, 389, 118.)

But if it were true that in both of the cases, that in which there is a trustee, and that in which there is none, a trust in the possible balance of the property would result to the surety, that would be no reason why the surety would not, in the cases respectively, be discharged on a waste of the property assigned.

For it is, I believe, a general principle, that if property which is held in trust for the payment of debts, is wasted by

the trustee, the loss, if the trustee cannot repair it, falls on the creditor. It never falls on one who has no more interest in the property than the right, by implication of law, to such part of the property as may remain, if possibly any part shall remain, after the debts shall have been paid out of the property.

If land is, by will, conveyed to trustees, for the payment of debts, and they raise from the rents money enough to pay the debts, the land becomes discharged of the debts, and the heir takes it unincumbered, although the trustees may have converted the money to their own use, instead of applying it to the payment of the debts. (1 Salk. 153; 1 Peere-Williams, 518.)

Yet, in such a case, a trust in the remainder of the property, if any, would result to the heir.

So, when property is conveyed to a trustee, that he may sell it and raise money for the payment of debts, the purchaser is not, in general, bound to see to the application of the purchase money. If the trustee misapplies or wastes the money, the loss falls, not on the purchaser, but on the creditor. And yet, in such a case, the purchaser, if the property were re-sold for the payment of the bills, and any of it should remain after their payment, would have a resulting trust in that remainder.

So, as we have seen, if property be conveyed by a debtor directly to his creditor, to secure the payment of a debt, and the creditor wastes the property, the debtor is discharged. And yet, in such a case, the debtor would have a resulting trust in any of the property that might remain, after the payment of the debt.

Am I not, therefore, entitled to say, that in neither of the two cases is there or can there be any resulting trust in the surety, and that if there was or could be, that would not render the surety liable for a waste of the assigned property? I think I am.

If so, the argument founded on the assumption that there is such a resulting trust in the surety is doubly worthless.

My conclusion then is, that in the case in which there is a trustee, waste as much discharges the surety as it does in the case in which there is no trustee; and that, as in the latter case, the surety is, beyond question, discharged, so, in the former, the surety must also be discharged.

It follows, if I am right, that as the stockholders were but sureties, a waste of the assigned property by the assignee, was a discharge of them to the extent of the wasted property.

This, then, is the conclusion to which I come, considering the case as unaffected by the judgment of forfeiture; that is, considering the case as standing upon the assignment, and the law contemporary with the assignment.

But as a judgment of forfeiture was rendered against the bank, it becomes necessary to inquire what effect that judgment has on the question:

- 1. One effect of the judgment of forfeiture was, in my opinion, to extinguish all the debts due to and from the bank. My reasons for this opinion I shall give when I come to treat of the point with respect to the judgment of forfeiture. If I am right in this opinion, it follows that the effect of the judgment was, to discharge the steckholders from any liability they might be under to pay the bills of the bank.
- 2. But granting, for the present, that extinguishment of the debts of the bank, was not one of the effects of the judgment of forfeiture, an undoubted effect of that judgment was, to bring into operation the Act of 1842, respecting banks in a state of suspension, and to induce the Legislature to pass the Act of 1843, amendatory of the Act of 1842. (Cobb's Dig. 118, 120.)

Did the coming into operation of these two Acts affect the conclusions just stated, derived from the law existing previously to the time when those Acts came into operation?

I say no.

The first of the two Acts was, by its terms and nature, not to go into effect until after there should be a judgment of forfeiture. The assignment was not made until after there

was the judgment of forfeiture. The Act, therefore, could not take effect until after the making of the assignment. The second Act was not passed until after the making of the assignment. Neither Act, therefore, had any operation until after the making of the assignment.

Now it is to be presumed that the Legislature does not intend its Acts to have a retroactive operation, unless a contrary intention is expressed, or appears by necessary implication.

With respect to the Act of 1842, an intention that it should have a retroactive operation on the assignment, is not expressed in it, nor is any thing expressed in it from which such an intention could be implied. How could it be, as the Act was passed before the assignment was made, or, as far as appears, was in contemplation.

And as to the Act of 1843, the same thing is true. The object, at least a great object, of that Act was, to set up and make effectual the assignment. The first section of the Act declares, that this assignment and two other similar ones, shall be "valid for all purposes, both in Law and Equity." This is the sole office of the section. The office of the second section is to declare, "that the assignees shall have power and authority to proceed forthwith to the settlement, collection and payment of the debts due to and from said banking institutions, according to the provisions of the said several deeds of assignment."

If it was the intention of the Legislature to make valid the assignment, it of course could not have been its intention to affect the rights and risks created by the assignment.

I say, therefore, that neither of these Acts touched the rights and risks created by the assignment. But if either or both did, then I suppose it will be contended by none that the effect was more than this: to give to the stockholders a resulting trust in such of the assigned property as should remain, if any should remain, after the payment of the debts, i. e. to put the stockholders with respect to this possible, balance, in the place of the bank itself.

Robinson za. Lane.

But an effect of this sort would not be sufficient to render the stockholders liable to the creditors (the bill-holders) to answer for a waste of the assigned property, committed by the assignee.

That one may have a mere resulting trust in the possible balance of property which has been assigned for the payment of debts, whether assigned to the creditors directly or to a trustee for the creditors, does not render him liable to the creditors to make good such of the property, if any, as may have been wasted. The loss, in such case, falls upon the creditors. This we have seen.

The rendition of the judgment of forfeiture with the change of the law consequent upon it, have, then, no effect upon the conclusion to which we came, from the old law. That conclusion was, that when a debtor assigns to a trustee property for the payment of his debts, and the trustee wastes the property, the debtor's sureties are not liable to the creditors to make good the loss.

The stockholders, we have seen, were but sureties for the bank—the debtor. Therefore they are not liable to the creditors, the bill-holders, to repair any loss occasioned by the assignee's waste of the property.

I come, then, to the third and last of the points on which I dissent, and that point is as to the effect which the judgment of forfeiture, rendered against the bank, had on the liability the stockholders were under for the ultimate redemption of the bills of the bank.

The Court was requested by the plaintiff in error to charge the Jury as follows: "That if the Jury shall believe, from the evidence, that the charter of the P. & M. Bank of Columbus was, on the 13th day of June, 1843, absolutely and unconditionally forfeited, without reservation of the rights of plaintiff, and without retaining and continuing the liabilities upon the defendant, then all the debts due to and from said bank became extinguished; and if they shall further believe, that the bills sued on by the plaintiff are debts due from said bank on the day and time of said absolute forfeiture, then said

debts were extinguished, and the defendant cannot be made liable for an extinguished debt."

The Court refused to charge this, and the plaintiff in error excepted to the refusal.

In this refusal was the Court right? That is the question.

A majority of this Court answer yes. I answer no; and I will now state why I do so.

The rule of the Common Law that defines the consequences of the dissolution of a corporation, is as follows: "At Common Law, upon the civil death of a corporation, all its real estate, remaining unsold, reverts to the grantor and his heirs; for the reversion, in such an event, is a condition annexed by the law, inasmuch as the cause of the grant has failed. The personal estate, in England, vests in the King; and in our own country, in the people or State, as succeeding to this right and prerogative of the Crown. The debts due and from it are totally extinguished." (Ang. & Ames Cor. 667.)

That this is the Common Law rule that defines the consequences of the dissolution of a corporation, nobody, as far as I know, disputes; that it is that rule, both of my associates, I believe, admit; that it is that rule, every author, or Judge, or Court, that has attempted to state what the rule is, has, as far as I know or believe, declared.

Therefore, that this is the Common Law rule, I assume with confidence.

If this be the rule, it is clear that the debt due to the defendant in error, from the bank, was extinguished by the judgment of forfeiture rendered against the bank, unless there is something to take the debt out of the operation of the rule.

Is there anything to do that?

In the opinion of Judges LUMPKIN and McDONALD, thereis.

Judge McDonald thinks, that inasmuch as the judgment of forfeiture was not executed by an execution of some sort, the judgment did not have the effect to dissolve the corpora-

VOL. XIX-48

tion. If, in his opinion, the judgment had had that effect, he, as I understand him, would say with me, that this debt fell within the rule, and was extinguished.

The sole question, then, between him and me is, whether the judgment of forfeiture, of itself, dissovled the corporation, or whether an execution had to be issued on that judgment, and had to be executed, before the judgment could produce that effect.

The judgment is not set out in the record. It is to be inferred, however, from the terms of the request to charge, that the judgment was one which declared the charter of the corporation to be "absolutely and unconditionally forfeited, without reservation of the rights of plaintiff, and without retaining and continuing the liabilities upon the defendant." I suppose the judgment was, in substance, this: that the liberties, privileges and franchises of the bank, to-wit: those of being a body politic and corporate, be seized into the hands of the State, and that the bank do not, in any manner, intermeddle, have, use, enjoy or exercise, any of the liberties, franchises or privileges of a body politic or corporate, but that the bank be absolutely forejudged and excluded from holding, using or exercising any of the privileges, franchises or liberties of a body politic or corporate. (See 11 Ga. R. 463.)

If this was the judgment, then I say that the judgment is such as executes itself, or must go unexecuted. It certainly is a judgment which it is simply impossible for any Sheriff to execute, let the command to him, in respect to it, be what it may. It is not a possible thing for a Sheriff to seize a liberty, a privilege, a franchise, or to prevent a corporation from using a liberty, a privilege or a franchise, or absolutely to forejudge and exclude a corporation from holding or using a liberty, a privilege or a franchise. It is no more possible for a Sheriff to do such a thing, than it is for him to capture an idea. And lex non cogit ad impossibilia.

But the judgment is such as executes itself. This must be so from the nature and the terms of the judgment. And it

is so according to authority. In the King vs. Amory, there was not only no execution, but there was no final judgment of ouster. The only judgment was one, that the liberties, &c. should be seized into the hands of the King until the Court should further order. And yet, the King's Bench held, that this judgment dissolved the corporation. (2 D. &.E. 519, 565; and see 2 Just. 282.)

But if this judgment is such as executes itself, then it, in terms, dissolves the corporation; for it says, (assuming that I am right as to its terms,) that the liberties, privileges and franchises of the bank, to-wit: those of being a hody politic and corporate, be seized into the hands of the State.

It is true, that in Nevitt vs. Bank of Port Gibson, this language is used: "It is the better doctrine, that it is not the mere judgment of ouster or of forfeiture, which works dissolution, any more than sentence of death executes a criminal. There must be execution executed." (6 Smedes & Mars. 568.)

But for this position, no Common Law authority is referred to. Nothing is referred to except some very late decisions in State Courts, and Angell & Ames on Corporations. And what is said in this latter work, is said with an "it seems," and is made to rest on one of these very decisions. (Ang. & Ames Cor. 644.) What the decisions, themselves, rest on, is not stated. I feel sure that they cannot rest on the King vs. Amory, or any Common Law authority. And if that be so, they cannot count as of any value in this State.

Besides, one out of the three Judges of the Court which made the decision in *Nevitt vs. Bank of Port Gibson*, dissented from the decision.

I cannot agree, therefore, that according to the law of Georgia, "It is the better doctrine, that it is not the mere judgment of ouster, &c. which works dissolution," &c. but that "There must be execution executed." I think that such a judgment as that judgment is, which was rendered against this bank, if that judgment was such as I have supposed it to be, has, of itself, the effect, by the Common Law, to dissolve

a corporation. And the Common Law is the law of this State on the question.

So much for my dissent from Judge McDonald.

Judge LUMPKIN, if I understand his views, as disclosed in this case, and in the similar case of Moultrie et al. vs. Smiley and Neal, (16 Ga.) thinks that this case is not within the rule aforesaid, that defines the consequences of the dissolution of a corporation; and he thinks so because, in his opinion, the case is not within what he considers to be the reason of the rule.

In 16 Ga. 294, he says, "I deem it advisable to examine, at the outset, into the origin of this Common Law rule, not for the purpose of questioning its legality, but in order to restrict it in its application to the reason in which it is founded. For, cessante ratione legis cessat ipsa lex. And I feel fully warranted in this course, inasmuch as the rule has been justly characterized, by the most enlightened tribunals, as odious and iniquitous." Again, he says, "I propose to consider now the true meaning of the word extinguished, when used in this connection."

"I am not ignorant of its etymological definition. Lord Coke, the "Hercules of the law" who has written so much, has furnished this also: "Extinct" he says "cometh of the verb extinguere, to destroy or cut off." (Coke Litt. 1 Vol. by Thomas, 464.) But the proper inquiry is, what is the legal signification, when applied to the debts to and from a defunct corporation?"

"I have said elsewhere, that the only idea intended to be conveyed was, that the debts were uncollectable for want of proper parties to sue and be sued."

In the opinion of Judge LUMPKIN, then, the reason of the rule is, the "want of proper parties to sue and be sued."

And to prove that this is the reason of the rule, his argument, if I do not misunderstand it is, 1. That certain Judges have declared this to be the reason of the rule. 2. That there are certain other cases in which, also, the debt is said to be extinguished, when it is not really extinguished, and that

in those cases the reason why this is said is, that in them there is nobody to sue or be sued. 3. That it is the duty of Courts "to struggle hard to get away from this rule as it stands, because, as it stands, it is a bad rule, and to hold the want of somebody to sue and be sued to be the reason of the rule, will enable them to get away from the rule as it stands."

The sole question, then, between Judge Lumpkin and myself is, whether the want of somebody to sue and be sued, is the reason of the rule? We agree as to what the rule is. We differ as to what the reason of the rule is. If I could show that the want of somebody to sue and be sued, was not the reason of the rule, he, I dare say, would agree with me that the debt in this case was extinguished by the rule. That that is not the reason I shall now attempt to show. I shall attempt to show that and somewhat more.

I shall attempt to show-

- 1. That the want of somebody to sue and be sued, is not the reason of the rule.
- 2. That, at least, if that be the reason of the rule, the argument aforesaid does not prove it to be the reason.
- 3. That the maxim, the reason ceasing the rule ceases, has place only when what is the reason is certain beyond a reasonable doubt, and that, at least, it is not certain beyond a reasonable doubt that this is the reason of this rule.
- 4. That if for any reason the debt in this case stands extinguished or suspended as against the bank, it equally stands extinguished or suspended as against the stockholder, because the stockholders are only the sureties of the bank.
- 5. That there exists no cause to take this case out of the rule.
- 6. That therefore, the case is within the rule; and consequently, that the debt is extinguished.
- 1. First, then, is the want of somebody to sue and be sued, the reason of the rule? I answer no; and in support of that answer, I beg, in the first place, to refer to what I have said on the question in my dissenting opinion in Moultrie et al. vs. Smiley & Neal, (16 Ga. R. 346.)

But in making this reference, it is proper that I acknowledge an error into which I fell in that opinion, in respect to one of the cases which I cited, that of Edmonds vs. Brown and Tillard. For this case I had to rely wholly on Viner's Abridgment; and judging from what is reported of it in that Abridgment, I inferred that the decision in it was made in the absence of the plea of non est factum; and my use of the case rested chiefly on that inference. Having, since writing out that opinion, procured the work in which the case was originally reported, (1 Levinz, 237,) I find that I was mistaken. The plea of non est factum was pleaded in the case. And it does not positively appear whether the decision in the case was what it was, in consequence of that plea, or in consequence of the dissolution of the corporation. But judging from the side note of the Reporter, Levinz, from the statement of the case in Viner, from the use made of the case by Blackstone and other elementary writers, (1 Black. Com. 484,) and especially, judging from the fact, that the case resulted, not in a verdict for the defendant on the plea, but in a non-suit of the plaintiff, we may, I think, pretty safely conclude that the decision was what it was, not in consequence of the plea, but solely in consequence of the dissolution of the corporation.

I proceed to state some views which are not presented in the dissenting opinion to which I have referred, or at least are not distinctly presented.

The rule in question is only one part of a rule; it is one part of the more general rule, which defines all the consequences of the dissolution of a corporation. And if we make the want of somebody to sue and be sued, the reason of the rule, and bend the rule to that as the reason of it, we put the rule in discord with the whole of the other part of the general rule, that other part being by far the greater part. We make the general rule stand thus: on the dissolution of a corporation, all its lands revert to those from whom they come—all its goods escheat—all the debts due to it, in effect, escheat too; or, if not, become extinct; all the debts due

from it, except those on which there are indorsers, sureties or other bound parties, become extinct; all the debts due from it on which there are indorsers, sureties or other bound parties, become extinct, as against the corporation, the principal, but as against the indorsers, the sureties or the other bound parties, remain in full life. It is only in reference to such parties, on one side, and the creditors of the corporation on the other, that we can say there is somebody to be sued—somebody to sue.

Making the general rule this what do we do? In one breath we say debts, as against the principal, and all the principal's property, shall be extinguished; in the next, we say the debts, as against the sureties, and all the sureties' property, shall remain in full force.

Now, I ask, is it supposable that any law-maker, of any age, would ever put these two things into one rule? Is it supposable that any law-maker, who would say the first of these two things, could ever bring himself to say the second?

And then, we make no improvement in the rule. We merely shift a loss from one innocent party to another.

As the rule stands, unmodified by this notion that somebody to sue and be sued is the reason of it, the effect of it is to make the creditors of the corporation lose their debts. This is an evil.

As the rule would stand if modified by that notion, the effect would be to make the sureties and indorsers, if any, pay the debts; and yet, deprive them of all chance of being indemnified by their principal or their principal's property, no matter how much property that principal might have. This, too, would be an evil.

And in the abstract, the loss—the hardship, is precisely as great if a surety has to lose the debt, as it is if the creditor has to lose the debt.

We must remember that the rule, if thus modified, would reach, not only the stockholders in a bank, but also the indorsers for the bank, the ordinary sureties of the bank, the guarantors of the bank, the parties of every sort, joined with

the bank. And we have seen that the stockholders in this bank are but sureties for the bank.

To say that the want of somebody to sue and be sued, was the only reason the law-maker had for declaring, that on the dissolution of a corporation, the debts due from it should be extinguished, is to impute to him a poverty of invention, which, judging from what he has done in other cases, we, I think, are not at liberty to impute to him.

When a debtor that is a natural person dies, or when he removes out of the jurisdiction, or when there is a trust and no trustee, the case presented is not unlike that which is presented when a corporation is dissolved. It is certainly a case in which there exists no person to sue or be sued. the law-maker say that it was a case in which the debt or the trust had to become extinct? Far from it. He treated the debt and the trust as still subsisting as much as ever, and he invented easy modes for enforcing the debt or the trust. Indeed, the modes are such as must have suggested themselves to the commonest mind-administration-attachment-judicial sub-Now are we at liberty to say of such a law-maker, that when he declared the debts of a dissolved corporation to be extinguished, he did so, not because he wished them to be extinguished, but because he had not the wit to invent a mode to prevent them from being extinguished?

At least, we cannot impute such a want of inventiveness to our own law-maker. The Legislature, at its last Session, having the will to prevent the debts of a dissolved corporation from being extinguished, said that they should not be extinguished, and it had the capacity to provide a mode for rendering that will effectual. The Legislature said, that whenever "any corporation shall be dissolved, the real estate belonging to such dissolved corporation, shall not revert to the grantor, nor its personal estate escheat, nor the debts due to and by such corporation, at the time of its dissolution, be extinguished; but the said property, both real and personal, and the said debts due to such corporation, shall remain as if no such dissolution had taken place and become a trust fund,

first, for the payment of the debts due by such corporation, and next for distribution amongst the stockholders thereof."

And I ask, in passing, in what sense does the Legislature here use the word "extinguished"—in the sense of suspended? Certainly not, but in the sense of annihilated. And it so uses the word in that sense, as plainly to show that it, the Legislature, considered the word to have that sense in the old Common Law rule.

What, then, is the reason of this rule? This rule is but a part of a general rule, that defines all the consequences of the dissolution of a corporation, and it is the last part. The former part of that rule having said that the lands of the corporation should revert; that the goods should escheat; that the debts due to it should become extinct, or in effect, escheat too, what better could the latter part say of the debts due from the corporation than that they should become extinct? Nothing, it seems to me. I think, then, that the former part of the rule, is the reason for the latter part. This is my conjecture. (See my opinion, 16 Ga. R. 355.)

I insist, then, that the want of somebody to sue and be sued, is not the reason of the rule.

2. If, however, that be the reason, I maintain that the argument which I am trying to answer, does not prove it to be the reason.

That argument, if I understand it, is as beforesaid, as follows:

- 1. Certain Judges have declared that the want of some-body to sue and be sued, is the reason of the rule. (16 Ga. R. 300.)
- 2. If a person appoints his debtor his executor—if a woman marries her debtor—if a lunatic's debtor is appointed the lunatic's committee, the debt in each of these cases, respectively, the law says, is extinguished; and yet, the debt is not extinguished, but is only suspended. For, the reason which the law has in these cases for saying that the debt is extin-

guished is, that in them there exists nobody to sue and be sued.

Therefore, concludes the argument, in like manner, when,
in the case of a dissolved corporation, the law says that the
debts are extinguished, the debts are not really extinguished,
but are only suspended; and the reason which the law has
for saying that they are extinguished, is merely that there is
nobody to sue and be sued. (1d. 300 304.)

3. It is the duty of Courts "to struggle hard to get away from" the word extinguished, used in this rule, because that word, if taken in its ordinary sense, would make the rule a bad rule; and if they will hold the want of somebody to sue and be sued to be the reason of the rule, they will enable themselves to get away from the word. (Id. 333.)

I address myself, first, to the second head of this argument, as much of what I have to say upon that head, will be, in some degree, applicable to the first head.

I make one general objection to the argument under this second head—an objection equally applicable to it in each of its three branches. The argument is an argument from analogy—a kind of argument too frequently fallacious, when analogy really exists. My objection is, that here analogy does not really exist.

When a corporation is dissolved, its lands revert, its goods escheat, its choses in action either become extinct, or, if not, they, too, in effect, escheat, as if they are collected the money escheats.

But when a debtor becomes the executor of his creditor—when a debtor becomes the husband of his creditor—when the debtor of a lunatic becomes the committee of the lunatic—none of these things, or the like of these, happens to the debtor.

And it seems to me, as I have said, that in these things, the law might see as good a reason for saying the debts of a corporation shall be extinguished, as it could see in the fact, that on the dissolution of the corporation, there is nobody to sue or be sued.

Bobinson es. Lane.

Now, with such a want of analogy, what is the argument from analogy worth? Surely very little.

Admitting, however, for argument's sake, that there is somewhat of analogy between the cases respectively, then I meet the argument with the following propositions:

- 1. I deny the law of the cases argued from, to be such as the argument takes it to be.
- 2. I maintain that law to be, in some respects, the opposite of what the argument assumes it to be; in others, quite different from what it assumes it to be.
- 8. Whether, however, the law be such as the argument takes it to be, or such as I take it to be, it is at least such that it puts the debt into a state of extinguishment or of suspension, as against the debtor himself. And I maintain that this same law, which thus does this, as to the debtor himself, equally does it as to the debtor's indorsers, sureties and codebtors of every sort. Hence, I say that if these cases prove the debt to be only in a state of suspension, as against the corporation, they equally prove it to be in a state of suspension as against the indorsers, the sureties and the co-debtors of the corporation, into some one of which classes the stockholders fall.
- 4. I conclude, that if any inference is to be drawn from the cases to the case in hand, it is the opposite of that which is drawn in the argument aforesaid.
- 1. I proceed, now, to establish these propositions if I can; and first, I will try to establish them with reference to the case in which a debtor is made the executor of his creditor.

As to this case, the proposition I am to meet is, that when a debtor becomes the executor of his creditor, the law says that the debt is extinguished; and yet, that the debt is not extinguished, but is only suspended; and that it is, thus, only suspended instead of being extinguished, because the law's reason for saying that it is extinguished, is merely the non-existence of anybody to sue or be sued for the debt, a man not being able to sue himself. I cannot admit this proposition.

I maintain, that in every instance under this head, in which

the law really says that the debt is extinguished, it is extinguished. I grant, however, that there are instances under it in which the law does not say that the debt is extinguished; but in these. I insist that the debt is not even suspended. These are the instances in which the assets, exclusive of the debt owed by the debtor-executor, are not sufficient to pay the testator's debts. In these instances the law does not say that the debt is extinguished. On the contrary, it says that in them the debt shall be assets. In Wins. on Ex'rs, (814,) is to be found this passage: "It must, however, be observed, that as between the debtor-executor and the creditors of the testator, this doctrine" (the doctrine of extinguishment) "is applicable only in cases where there are assets sufficient to satisfy the testator's debts. For it would be unfair to defraud the creditors of their just debts, by a release which is absolutely voluntary. And therefore, the debt due from the executor shall be considered, on their behalf, as assets in his And this is well sustained by the authorities cited And see Flud vs. Rumcey, (Yelverton, 160; to support it. Coke Lit. 264, b. Note 1.)

But in the instances in which the assets are sufficient to pay the debts, (and legacies?) the law does say that the debt due by the executor is extinguished, and it means what it says. The debt, in those instances is extinguished. This is well established. (Wms. Ex'rs, 811, 814, and citations.)

And I say, too, that in those instances in which the law says that the debt is extinguished, the want of somebody to sue and be sued cannot, I think, be the reason why it says so.

For first. So far as the executor himself is concerned, he has no need of any suit to enable him to collect the debt. He sustains, in his own person, the character of both debtor and creditor. He may, therefore, of his own mere will, pay himself whatever, as debtor, he owes himself as creditor.

Secondly. So far as claimants upon him, in respect to the debt legatees or others are concerned, they may sue him for an account of that debt, as easily as they can sue him for an account of any of the assets—as easily as creditors of the tes-

tator can sue him for an account of the debt, in those instances in which such creditors are entitled to make him account for the debt.

Thirdly. The want of somebody to sue or be sued, if it exists in the case of a debtor made executor of his creditor, equally exists in the case of a creditor made executor of his debtor; or of a debtor made administrator of his creditor; or of a creditor made administrator of his debtor. And yet, in neither of these cases does the law say that the debt is extinguished. (Wms. Ex'rs. 815, 817.) True, perhaps, that in the case of the creditor made executor or administrator, if assets, to the amount of the debt, come to his hands, the debt may, on the principle of retainer, be considered as extinguished; i. e. as, in effect, paid by the debtor.

Fourthly. There is no want of somebody to sue and be sued, in the case in which the debt of the debtor made executor of his creditor, is joint and several, or in that in which it is indorsed; and yet, in these cases, whenever the law says that the debt is extinguished as against the debtor-executor, the debt is equally extinguished against the co-debtor or the indorser. (Infra.)

Fifthly. Another thing than the want of somebody to sue and be sued is, I maintain, in the case of the debtor-executor, the reason why the debt is said, by the law, to be extinguished, in the instances in which it is said to be extinguished, as well as the reason why the debt is said, by the law, not to be extinguished, in those instances in which it is said not to be extinguished. Where a creditor appoints his debtor his executor, the law presumes that his intention is to release the debt. (Wankford vs. Wankford. Yelv. 160; 8 Coke, 136.) This intention is a lawful one, if the debt is not needed as assets for the payment of the testator's debts; if it is needed for that purpose, the intention is not a lawful one. Therefore, in the former case, the law ought to say that the debt is extinguished, whilst in the latter, it ought to say that the debt is not extinguished. I think, is the reason of the rule.

Sixthly. But whether, in this case of the debtor-executor. the law, when it says that the debt is extinguished, means that it is extinguished, or means only that it is suspended; and whether the reason which the law has for saying this, is the want of somebody to be sued, or is some other reason, one thing I feel confident is certain, and that is, that as long as the debt remains in the condition, whether of extinguishment or of suspension, as to the debtor, it remains in that same condition, as to the debtor's sureties and indorsers. if several obligors be bound jointly, and the obligee constitute one of them his executor, it is an extinguishment of the debt at law, and a release to them all. So, if an obligee in a joint and several bond, makes one of two obligors his executor, the action is discharged as to both obligors; for a release to one of several obligors, whether they be bound jointly or jointly and severally, discharges the others, and may be pleaded by (Wms. Ex'rs, 812.)

Now if these things are so, it is quite manifest, I think, that with respect to the case of the debtor-executor, my first three propositions are true. But if those three are true of that case, the fourth must also be true of it, for it is but a plain conclusion from them. It is, that if any inference is to be drawn from the cases, (including this case of the debtor-executor,) that inference is the opposite of the one which is drawn from them in the argument which I am trying to answer.

2. I proceed to the next of the three cases on which this head of the argument I am trying to answer is made to rest, and that is the case of the debtor who marries his creditor. And as to this case, I feel sure that we may say of it most of what has been said of the case of the debtor-executor.

According to Lord Coke, the marriage in such a case amounts to a release of the debt. "If the feme obligee take the obligor to husband, this is a release, in law. The like law is, if there be two femes obligees, and the one take the debtor to husband." (2 Coke Litt. 264, b.) And in Viner's Abridgment we find this: "If two are bound to a feme by

obligation, and she marries one of them, and after he dies, the debt is discharged forever." (Vin. Abr. Exting.)

And why should not marriage, in such a case, operate as an extinguishment of the debt? Before the marriage, the debtor has the actual possession of the debt; after the marriage, he has, in addition, the right of possession of it. Is not the marriage, then, equivalent to his reduction of the debt into possession? But whenever the husband reduces the wife's choses in action into his possession, they vest absolutely in him.

But suppose, that when Lord Coke says, that "if the feme obligee take the obligor to husband, this is a release in law," he only means that it is a suspension of the debt-a suspension of it during the marriage, does it follow that the want of somebody to sue and be sued is the reason of such suspen-I say no; for if the wife has a right against the husband, she may assert it by a suit against him. If she has a right to a divorce, she may sue him for a divorce; if she has a right against him with respect to her separate property, she may, by the aid of a next friend, assert that right by a suit against him; so, if the wife had a right to collect from her husband the debt which he owed her before the marriage. would she not have the right to sue him for that debt? If. then, the debt of the husband to the wife is only suspended during the marriage, can we say that the want of somebody to sue and be sued, is the reason of such suspension?

Suppose the debt be one in which the husband is principal and others are indorsers or sureties, can the husband and wife, after the marriage, sue these indorsers and sureties for the debt? Yet, the case is one in which there are persons who might serve as parties to sue, and persons who might serve as parties to be sued.

But say that the debt is only suspended during the marriage, and that the reason of such suspension is, that the wife cannot sue the husband, what avails it to the support of the argument in question? For as long as the wife cannot sue the husband, so long she cannot sue his indorsers and sure-

ties. But unless she could do that, how can it be argued from her case, that the creditors of the corporation, though unable to sue the corporation, can yet sue the sureties of the corporation? The very opposite is to be argued from her case. The stockholders in the corporation are but sureties for the corporation.

So, I draw the same conclusion in this case which I drew in the case of the debtor made executor.

3. The last case on which the argument I am combatting, is made to rest, is thus stated: "When one, indebted to the estate of a lunatic, by speciality, is appointed committee of the estate, and the specialty is transferred to and received by him as committee, the debt is extinguished, and the securities to his bond, as committee, are liable for so much money received by him."

In reference to this case, I simply ask if the debt is not also extinguished against the debtor's co-obligors—against the debtor's sureties? does not the authority mean to say that what takes place is equivalent to a reduction of the debt into the committee's possession—equivalent to a payment by him to himself of the debt?

Have I not, then, with respect to each of the three cases on which this head of the argument I am trying to answer rests, made out my four propositions? I confidently think so. The last of the four is the only one I will repeat. It is, that if any conclusion is to be drawn from the three cases, to the case in hand, it is a conclusion the opposite of that which was drawn in the argument which I am endeavoring to answer.

2. I proceed to notice, in a few words, the first and the last of the three heads of the argument. Of these, the first is, that certain Judges have said that the want of somebody to sue and be sued is the reason of the rule. And two Judges of the Supreme Court of Mississippi are referred to, as the Judges meant. The Bishop of Rochester's case is also referred to as a case in which the Court say this is the reason of the rule. This case, except as it is found in Viner's Abridg-

ment, is not within my reach. As it stands in that Abridgment, it contains no such saying of the Court. (6 Vin. Abr. Corp. (H. 3) 8.)

What reasons these two Judges had for their opinions, does not in the reference appear. Probably they had none better than those which Judge LUMPKIN has given for his opinion. I leave their opinions to what I have said of his opinion, and to what more I have to say of it, and to the decisions of the very Court in which they presided—decisions made in President, fc. Port Gibson vs. Moore, (13 Smedes f Mar. 158,) and in Coulter et al. vs. Robertson, (2 Cushman's R. 321) the first of which decisions was, that a debt of a corporation is so completely extinguished by the dissolution of the corporation, as not to be revivable by the revival of the corporation—a decision which could not have been made if the mere want of somebody to sue and be sued, had been regarded as the reason of the rule, for the revived corporation constituted somebody to be sued. See, too, my dissenting opinion in 16 Ga. 346.

3. The last head of the argument is, that it is the duty of Courts "to struggle hard to get away from" the word extinguished contained in the rule, because that word, if taken in its ordinary sense, would make the rule a bad one; and if Courts hold the want of somebody to sue and be sued to be the reason of the rule, a way is opened by which they may get away from that word.

And first, I cannot admit that it is the duty of Courts to "struggle hard to get away from" any clear rule of law. I insist, on the contrary, that it is as much the duty of Courts to give full effect to every clear rule of law, however mischievous they may conceive it to be, as it is to give full effect to every such a rule, however beneficial they may conceive it to be. What power have Courts to change any rule of law? None. There is but one question for a Court: What is the law?

But certainly it is not the duty of a Court "to struggle YOL. XIX-50

hard to get away" from one bad rule only to get to another equally as bad. And to go from a rule which says, that on the dissolution of a corporation, all its lands revert, all its goods escheat, all the debts due to it become extinct, all the debts due from it become extinct, to a rule which says, that on the dissolution of a corporation, all its lands revert, all its goods escheat, all the debts due to it become extinct, all the debts due from it become extinct, as against itself, but as against its indorsers and other sureties, remain in full force, is but to go from one bad rule to another.

Now if the proposal were a proposal to go to this rule, viz: that on the dissolution of a corporation, its lands, its goods, its choses in action, become a trust fund, for the payment of its debts, there would be the reason of expediency in favor of the proposal; for such an exchange would help creditors, and would not hurt sureties and other innocent parties more than they ought to be hurt. And this is the exchange which the Legislature, at its last Session, made. And this is the exchange which Judge Story, in one of the later editions of work on Equity Jurisprudence, makes, but makes without the aid of any Act of any Legislature. •(§1252 Sto.) I believe, is an exchange which no member of this Court thinks it competent for any Court in this State, by its own unaided power, to make. And that is the opinion of the Legislature too, as is evinced by the passage of the Act referred to.

I say, then, that it is not the duty of a Court "to struggle hard to get away from" what is the natural and obviousimport of this rule, merely to get to what this argument substitutes for that import.

If, therefore, a Court that thinks it its duty to do so, does so, we are but the more admonished to scrutinize the process by which the Court does so.

3. Having thus endeavored to show, that if the want of somebody to sue and be sued be the reason of the rule, this argument is not sufficient to prove it to be so, I proceed to my next main position, which is, that the maxim—the reason

ceasing the rule ceases—has place only when what is the reason is certain beyond a reasonable doubt; and that what is the reason of this rule, is not certain beyond a reasonable doubt.

The first of these two propositions is obviously true.

And is not the second almost equally self-evident? Can any man deliberately say that he is certain, beyond a reasonable doubt, as to what is the reason of this rule? This is a rule of the Common Law; and what eye can now penetrate through the layers of darkness, centuries thick, down to the foundations on which the rules of the Common Law are laid? All arguing and debating about what is the reason of a rule of the Common Law, must, of necessity, be more or less of the nature of guess-work.

In relation to this particular rule, I have hazarded my guess as to the reason of it; and that is, that as the previous part of the general rule of which this makes a part, had said that the corporations' lands should revert and its goods escheat, and the debts due to it become extinct, or if not, escheat too, so this, the latter part of the rule, had, as a matter of course almost, to say that the debts due from it should be extinguished.

Judge LUMPKIN has come to the conclusion, that another thing is the reason of the rule, viz: the want of somebody to sue and be sued.

Now it seems to me hardly possible for any man who will read over what he has said in favor of his opinion, and what I have said in favor of mine, to affirm that he is certain, beyond any reasonable doubt, that the Judge's opinion is right and mine wrong. But unless the man could say this, would he be justified in following the Judge's opinion, to the setting aside of the plain meaning given by the words of the rule?

4. I pass to my next main position, which is, that if, for any reason, the debt is extinguished or suspended against the bank, it is equally extinguished or suspended against the

stockholders of the bank; for they are only the bank's sure-ties.

It is a general principle, that whenever a debt is in a state of extinguishment or of suspension against the principal, it is in the same state against the surety.

Examples of this we saw in the case of the debtor-executor and that of the debtor-husband; in both of which cases, we saw that if the debt was extinguished or suspended against the debtor, it was also extinguished or suspended against the debtor's sureties.

These are but examples. The rule is a general one. (See Vin. Abr. Exting. M.)

That the stockholders are but sureties for the bank, I think I have, in a previous part of this opinion, shown.

5. May there not be some other reason sufficient to take this case out of the rule, as to extinguishment?

The judgment of forfeiture was not such a judgment as the Act of the Legislature directed the Court to pronounce. The words of that Act are: "The Judge shall pronounce the judgment of the dissolution of said corporation, for all purposes whatsoever, saving and excepting as to its power, in its corporate name, to collect and pay its debts, and to sell and convey its estate, real and personal." Instead of pronouncing such a judgment as that thus pointed out by the Act the Court passed a general judgment of seizure and ouster. At least, so I have considered myself justified in assuming. It was said, in the argument, that the Court's reason for doing this was, that the Court considered the aforesaid words of the Act to be unconstitutional.

For ought that appears, both parties, the State and the bank, acquiesced in this judgment. It does not appear that any attempt has been made to set it aside, and it is now twelve years old.

Under these circumstances, the question is, does this judgment have validity?

I say yes. I say it must be considered valid, until it is set aside.

In Bostwick vs. Perkins et al. this Court say: "Where the Court in which the judgment is rendered, has no jurisdiction, either of the person or the subject-matter of the suit, then the whole proceeding is unquestionably void and a nullity; but where the Court has jurisdiction, both of the person and the subject-matter of the suit, although it may err in its opinion of the law, yet, such judgment is conclusive upon the parties to it, where there is no appeal." (4 Ga. R. 49.)

This is repeatedly affirmed by the Court. (Rogers vs. Evans, 8 Ga. R. 145; Preston vs. Clark, 9 Ga. R. 244; Mobley and others vs Mobley, 9 Ga. R. 247.)

That the Court had in this case, jurisdiction of the person and of the subject-matter, there can be no doubt; therefore, its judgment, even if erroneous, must bind until it is set aside.

This Act of the Legislature, then, does not have the effect to take the case out of the rule.

Does there exist any other thing which could be thought to have that effect? Not within my knowledge.

What, then, is the state of the argument between Judge LUMPKIN and me? This:

There is a rule of law which says, that on the dissolution of a corporation, its debts are extinguished. This we both admit.

This rule means, I think, that the debts are annihilated. Annihilated is the etymological, the common and the technical meaning of "extinguished." The rule in this sense, has been, in a number of cases, applied to the debts of a dissolved corporation.

The rule, as he thinks, does not mean that the debts of a dissolved corporation are annihilated, or mean anything which, in the least, affects the debts, as to other parties to them, than the dissolved corporation itself; and this opinion he puts on what he conceives to be the reason of the rule—a want of some one to sue and be sued.

I meet him, by insisting that Courts cannot set aside the plain sense of the words of a rule of law, upon what they may conceive to be the reason of the rule; that, at least, they can-

Robinson vs. Adkins.

not do so, unless it is certain what is the reason of the rule; and I show, I think, that what he conceives to be the reason of this rule, cannot be the reason of it; or, at least, that it is doubtful whether that is the reason of it or not. And I further show, I think, that even if that be the reason of the rule, yet, as the debt, as against the bank, is within the rule, it must be within it as against the stockholder.

This being, as it seems to me, the state of the argument between us, I feel constrained to stick to the plain words of the rule.

Upon the whole, therefore, my conclusion is, that the case is within the rule. If it is within the rule, the Court should have given the charge which it was requested to give.

The judgment of the majority of the Court being, that the Court below was right in refusing to give the charge, I am forced to dissent from that judgment.

No. 69.—ALEXANDER J. ROBINSON, plaintiff in error, vs. Solomon Adkins, defendant in error.

[1.] "It is the right of Counsel to argue both the law and the facts of his case to the Jury, subject, of course, to the charge of the Court upon the law, and his right to grant a new trial, should the verdict be contrary thereto."

Debt, in Muscogee Superior Court. Tried before Judge WORRILL, June Term, 1855.

This was a suit by Adkins, a bill-holder, against Robinson, a stockholder in the Planters' & Mechanics' Bank of Columbus, for the redemption of the bills of said bank. Many of the questions made and errors assigned, being the same with those argued and determined in the foregoing case, (Ro-

Robinson es. Adkins.

binson vs. Lane,) and upon the same state of facts, it is unnecessary to repeat them here.

Defendant objected to the record of the suit vs. Alexander the assignee, on the ground that the declaration described the notes as made by said Alexander. The Court over-ruled the objection, and defendant excepted.

Ragan, the present assignee of the bank, admitted that he had as assets of the bank, \$40.000 of the bills of the Western Bank of Rome. Defendant, to rebut the return of nulla bona, proposed to show the value of these bills by proving that the stockholders were solvent. The Court rejected the evidence, and defendant excepted.

Defendant also proposed to show, that certain notes among the assets on J. C. Watson and others, were solvent in 1843, 1844 and 1845. The Court rejected the evidence, and defendant excepted.

Defendant proposed to show the amount of assets turned over to Alexander as assignee, and avowed his object was to show the assent of this creditor to the assignment, he having brought suit against Alexander as assignee. The Court held the testimony inadmissible, unless an actual, not implied assent, could be shown. To this decision defendant excepted.

When H. Holt, Esq. was arguing the case for def't to the Jury, he was proceeding to read portions of the charter, to show the Jury that defendant was not the owner of the 475 shares of stock transferred to him, when he was stopped by the Court and required to argue that question to the Court as a question of law, and not to the Jury. Counsel insisted, but the Court refused to allow him to proceed on that point to the Jury. To this proceeding defendant excepted.

The charge of the Court and the refusals to charge, are the same as in the preceding case. And to all of them defendant excepted.

B. HILL; H. HOLT, for plaintiff in error.

W. DOUGHERTY, for defendant in error.

Robinson vs. Adkins.

· By the Court.—BENNING, J. delivering the opinion.

The judgment of this Court in this case was, that the case "be reversed upon all the grounds of reversal contained in the case of Lane vs. Robinson, decided at this term.

[1.] "As to so much of the bill of exceptions as relates to the conflict between Counsel and the Court, this Court holds that it is the right of Counsel to argue both the law and facts of his case to the Jury, subject, of course, to the charge of the Court upon the law, and his right to grant a new trial, should the verdict be contrary thereto."

As to the first part of this judgment, I merely refer to what is said by the Court, and by me in dissent, in Lane vs. Robinson, the case mentioned in that part of the judgment.

In support of the latter part of the judgment, I will refer to some provisions of the several Constitutions of the State, and then to a Common Law authority or two.

The provisions in the Constitution of 1777, which I refer to, are the following:

"XLI. The Jury shall be judges of law as well as of fact, and shall not be allowed to bring in a special verdict; but if all or any of the Jury have any doubts concerning any points of law, they shall apply to the Bench, who shall, each of them, in rotation, give their opinion."

"XLII. The Jury shall be sworn to bring in a verdict according to law, and the opinion they entertain of the evidence: provided, it be not repugnant to the rules and regulations contained in this Constitution."

"XLIII. The Special Jury shall be sworn to bring in a verdict according to law, and the opinion they entertain of the evidence: provided, it be not repugnant to justice, equity and conscience, and the rules and regulations contained in this Constitution, of which they shall judge."

There is nothing in this Constitution, which gives the Court the power to grant new trials. (Watk. Dig. 14.)

The provision in the Constitution of 1789, to which I refer,

Robinson es. Adkins.

is the following: "Freedom of the press, and trial by Jury, shall remain inviolate."

In this Constitution was a section, saying that the General Assembly should point out the mode of correcting errors and appeals, to extend as far as to empower the Judges to direct a new trial. (Id. 29, 28.)

The provision to which I refer in the Constitution of 1798, is the following: "Freedom of the press and trial by Jury, as heretofore used in this State, shall remain inviolate."

In this Constitution, power was given to the Court "toorder new trials on proper and legal grounds."

The Common Law authorities to which I refer, are these: "Also, in such case, where the inquest may give their verdict at large, if they will take upon them the knowledge of the law upon the matter, they may give their verdict generally, as is put in their charge," &c. This says Littleton. Coke, commenting on it, says: "Although the Jurie, if they will take upon them (as Littleton here saith,) the knowledge of the law, may give a general verdict, yet, it is dangerous for them so to doe, for if they doe mistake the law, they runne into the danger of an attaint; therefore, to find the speciall matter, is the safest way, where there is any doubt." (Coke Litt. section 368, p 228, a. And see Id. 155, b, note 5.)

Blackstone says: "But in both these instances," (instances of a special verdict and a special case,) the Jury may, if they think proper, take upon themselves to determine, at their own hazard, the complicated question of fact and law; and, without either special verdict or special case, may find a verdict absolutely for either the plaintiff or defendant." (3 Black. Com. 378.)

These constitutional provisions and Common Law authorities, taken together, seem to be quite sufficient to support the latter part of the judgment of this Court.

Speaking for myself, I must say that I think they are quite sufficient to support the proposition, that the Jury are the Judges of the law as well as of the fact, in all cases; and

VOL. XIX-51

Williams vs: The State.

that the only restriction upon this power, is the power in the Court to grant a new trial, when it deems the verdict contrary to law.

If so, what is the law, ought as well to be discussed beforethe Jury, as what is the fact; that is the right of the Jury, not less than the right of the parties.

No. 70.—ISAAC WILLIAMS, plaintiff in error, vs. THE STATE OF GEORGIA, defendant.

[1.] Where a witness, in behalf of the State, is detained from Court by themeans or procurement of the defendant, his previous examination taken down by the committing Magistrate, may be read on the trial.

Larceny, in Muscogee Superior Court. Tried before Judge WORRILL, June Term, 1855.

A single question is made by this record. Williams was indicted for the larceny of a watch, from a man named Thomas. On the trial, among other things, it appeared that Thomas and prisoner had settled the case. The Solicitor General stated that he had been informed that prisoner had induced Thomas to absent himself from Court; and from diligent search, he believed him to be in Alabama. The Court then allowed the written memorandum of the testimony, given in by Thomas before the committing Magistrate, to be read to the Jury, after the Magistrate swore that it was correct.

This decision is assigned as error.

HILL; E. G. DAWSON, for plaintiff in error.

Sol. Gen. Brown, for the State.

Williams vs. The State.

By the Court.—LUMPKIN, J. delivering the opinion.

[1.] It was resolved, upon the trial of Lord Morley, for murder, (7 State Trials, 421,) that in case oath should be made that any witness who had been examined by the Crown, and was then absent, was detained by the means or procurement of the prisoner, and the Court should be satisfied from the evidence, that the witness was detained by means or procurement of the prisoner, then the examination should be read; and that whether the witnesses was so detained, was matter of fact of which the Jury and not the Court, were the judges.

The only question, then, in this case is, was the foundation sufficiently laid by the preliminary examination of John B. Wright and the Solicitor General, to authorize the reading of the testimony of Anderson Thomas, which had been taken down, in writing, by the committing Magistrate? We think not. Mr. Wright proved nothing except the settlement of the case by the parties. And the only fact stated by Mr. Brown, was, that he had used all diligence to procure the attendance of the prosecutor, Thomas. The rest was all hearsay and inadmissible to make out the case, so as to let in the secondary proof.

We do not think that the 6th article of the amendments to the Constitution of the United States, which says, "the accused shall have the right to be confronted with the witnesses against him," has any bearing upon this point. The practice intended to be prohibited by that provision, was the secret examinations, so much abused during the reign of the Stuarts, and was not intended to disturb any great rule of criminal evidence.

Feagan ve. Cureton.

No. 71.—WM. H. FRAGAN, plaintiff in error, vs. A. H. & D. CURETON, defendants in error.

- [1.] The commissioner who executes the commission to a set of interrogatories, is the son of an Attorney for the party taking the testimony. He executes the commission in the office of the father, who cannot be positive whether he was present or not: *Held*, that the depositions ought to be suppressed.
- [2.] That a direct interrogatory has not been answered, is not, in the mouth of the cross-examining party, a ground of exception to the execution of the commission.
- [3.] On the trial of a claim the plaintiffs in f. fa. offered as evidence notes corresponding with the description of those on which their judgment was founded, and to prove the notes, offered the record of that judgment: Held, that the record was inadmissible for that purpose.
- [4.] Declarations which accompany any act, and which serve to account for or to explain the act, are admissible with the act; they are a part of the res gestes.
- [5.] If a debtor transfers property to defraud his creditor, the property may be condemned by the creditor, although the transfer is good as against the debtor, and although the condemnation will work to his benefit; but is cannot be condemned if there is any arrangement between the creditor and the debtor, by which the debt is paid off, or by which the debtor is to have the proceeds of the condemned property.
- [6.] A written request to charge, is presented to the Court; the Court reads it over slowly to the Jury, and says, I give you that in charge: Held, that if there is any thing wrong in the manner of giving this request in charge, it is something which does not appear.
- [7.] A verdict may be corrected in a mere matter of form, after the Jury have dispersed.

Claim, &c. in Muscogee Superior Court. Tried before Judge WORRILL, December Term, 1855.

This was a claim interposed to certain negroes levied on as the property of Richard Gibbs, and claimed by Wm. H. Feagan. After the parties had announced themselves ready for trial, and before the case was submitted to the Jury, claimant's Counsel moved the Court to suppress the reading of two sets of depositions, on the ground that there appeared no

Feagan vs. Cureton.

venue to their execution. The Court refused, and claimant excepted.

Claimant then moved to suppress another set, upon the ground that one of the commissioners was the son of one of the Counsel in the case. It appeared that the commissioner was himself an Attorney, having his own office. The depositions were executed in the father's office, but without his interference; nor was he informed as to the nature of the testimony. The Court refused the motion, and claimant excepted.

Claimant then moved to suppress another set, on the ground that the direct interrogatories propounded by the plaintiff in f. fa. were not fully answered. The Court refused the motion, and claimant excepted.

Plaintiff in fi. fa. offered in evidence certain notes made by Gibbs to plaintiffs, and the original suit and judgment therein, to show the indebtedness to have existed prior to the alleged sale to claimant. Claimant objected, on the ground that there was no evidence of the genuineness of the notes. The Court over-ruled the objection, and claimant excepted.

Plaintiff in f. fa. moved to suppress the reading of that portion of a set of interrogatories which stated the admissions of Gibbs as to his indebtedness to claimant, on the ground that the sayings of the defendant in f. fa. were not evidence against him. The Court granted the motion, and claimant excepted.

Claimant proved by Col. Holt, that Gibbs, though a resident in Alabama, acknowledged service on this suit in Georgia. Plaintiff in fi. fa. inquired of witness what Gibbs said at the time; claimant objected. The Court over-ruled the objection, and claimant excepted.

Claimant requested the Court to charge the Jury-

1st. That if they should believe, from the evidence, that the conveyance from Gibbs to Feagan, was fraudulent, and the suit against Gibbs was brought at his instance, and the levy prosecuted for his benefit, then the property is not subject.

Feagan vs. Cureton.

2d. That if Gibbs made a fraudulent conveyance, he cannot recover the property, either directly or indirectly.

The Court declined so to charge, and claimant excepted.

The claimant made another request to charge, which the Court read slowly to the Jury, and said—"The Court gives you that in charge, as the law of the case." To this manner of charging, claimant excepted.

By consent of all parties, the Jury were authorized to disperse, after agreeing on a verdict. When delivered by their foreman, next morning, the Court declared it informal, and ordered the Jury to return to their room, instructing them how to place their verdict in form.

This proceeding is excepted to by claimant.

J. Johnson; McDougald, for plaintiff in error.

H. HOLT, for defendant in error.

By the Court.—Benning, J. delivering the opinion.

The exception to the judgment which over-ruled the objection made to two sets of the interrogatories, that the commissioners had failed to state the place at which they took the interrogatories, was abandoned in this Court.

Hilliard, the commissioner in one of the sets of interrogatories, was the son of Hilliard the Attorney of the party taking the testimony. The commission was executed in the office of the father, who, when examined, could not be "positive" whether he was present at the execution of the commission or not.

[1.] These facts bring the case within the principle of Beverly and another vs. Burke, (14 Ga. R. 70;) Glanton vs. Griggs, (5 Ga. R. 424;) and Tillinghast, Stark & Co. vs. Walton (5 Ga. R. 335.) And that principle requires that the set of interrogatories should have been suppressed. What difference can it make, that the son was himself an Attorney at law?

Feagan ve. Cureton.

Can the cross-examining party except to the execution of a commission to take testimony, that the direct questions have not been answered?

[2.] We think not. Each party is entitled to have his own questions answered. He may repeat or adopt the questions of his adversary. If, however, he does, they become his own. If he does not, it is an intimation that he does not want them answered, or that he is indifferent about it.

If the examination of the witnesses be in Court, an objection from one party, that a question of the other has not been answered, will not be heard. A party may even withdraw his question, without the leave of his adversary.

What law is there that prescribes a different rule for the examination of witnesses, out of Court, on interrogatories?

We know of none.

The next exception is thus stated in the bill of exceptions: "Plaintiff in f. fa. then opened his case to the Jury, and offered to read in evidence two notes purporting to be signed by said Gibbs; and stated that their object in offering said notes, was to show that said Gibbs was indebted to said plaintiff in f. fa. prior to the transfer by Gibbs to Feagan of the negroes in dispute, and at the time of the sale was largely indebted-in failing circumstances. Claimant objected to said notes being read against him for said purpose, because there is no proof that they are genuine; that they were given for a valuable or good consideration, or that the date they bear is their true date. Plaintiff in fi. fa. offered, in connection with said notes, a declaration, in which said notes were discribed, and the judgment thereon in a certain proceeding had in the Superior Court of Muscogee County, in which said plaintiffs in fi. fa. were plaintiff, and said Gibbs defendant, but offered no evidence that said notes were genuine or given for a valuable consideration, or that the date they bore was their true date. Claimant objected to said notes being read separately in evidence to the Jury; also, to said record being read separately or in connection with said notes as offered, and for the purposes offered, for the reasons aforesaid.

Feagan es. Cureton.

Court over-ruled said objection, and allowed said notes and record to be read to the Jury as offered, and for the purposes offered. The Court over-ruled said objections and allowed said notes and record to be read to the Jury as offered, and for the purposes offered; and thereupon, the claimant excepted."

The introduction of the notes and the introduction of the record, are both objected to.

The objection to the introduction of the notes, we think, was a good one. The suit being against, not Gibbs the maker of the notes, but Feagan the claimant, the notes did not prove themselves. And the record did not prove them; for that was the record of a case to which Feagan was not a party, and the record of a judgment is not admissible against strangers to the judgment, to prove anything besides its own existence, "and those legal consequences which result from that fact." (1 Stark. Ev. 212; Green. Ev. §527; 1 Phill. Ev. 332, and Notes 582, 583.) This seems to be the general rule. I confess that it is not entirely intelligible to me.

[3.] The notes, we think, therefore, ought not to have been introduced until after the execution of them had been proved in the ordinary mode. If that had been proved, they would have become, as I think, prima facie evidence that they were founded on a valuable consideration, and that they were made at the time of their date. (Sto. Prom. Notes, §§7, 181; 3 Phil. Ev. (notes N) 1453.)

The reasons which were given for the objection to the admission of the record, were the same which were given for the objection to the admission of the notes; and those reasons were, that it had not been proved that the notes had been executed by Gibbs, that they were founded on a good consideration, and that they were of the date which they bore. If these things had been proved about the notes, the objection to the admission of the notes would have been removed; and if the notes had been admitted, there would probably have been no objection to the record's going along with them as evidence to the Jury. The objection was, as we understand

Feagan w. Cureton.

it, that the record was not admissible for the purpose of proving these things about the notes; not that it was not admissible for any purpose—for the purpose say of showing, by itself, by the allegations contained in it and the judgment thereupon, just such an indebtedness on the part of Gibbs, as that which the notes, if proved, were calculated to show.

And therefore, although we say that we consider the record not to have been admissible for the purpose of proving the execution, consideration and date of the notes, we do not say that we consider it not to have been admissible for any other purpose. As to its admissibility for any other purpose, we say nothing.

The exception to the decision of the Court below, which suppressed that portion of Pullin's depositions which gave the sayings of the defendant in f. fa. was, on the argument, abandoned by the Counsel for the plaintiff.

We think that what Gibbs said at the time when he acknowledged service of the declaration was admissible, as a part of the res gestæ.

[4.] It was said in connection with the act acknowledging service, and was what was calculated to explain or to account for that act. (Green. Ev. §108.)

The plaintiff in error requested the Court to charge the Jury as follows:

"1st. That if they should believe, from the evidence, that the conveyance to Feagan, by Gibbs, was fraudulent, and that the suit against Gibbs was brought at his instance, and that the levy in the case was prosecuted for his benefit, that then said property is not subject."

"2d. That if Gibbs made a fraudulent conveyance of the negroes to Feagan, that he, Gibbs, cannot recover them or their value by any direct or circuitous method in law; and that if this levy is for the benefit of Gibbs, the said property is not subject."

This the Court refused to charge, and we think, properly. The request has to be taken as a whole, or at least, as made

Feagan vs. Cureton.

up of two requests, each of which is a whole. So taken, it amounts, as we understand it, to asking the Court to say that if the condemnation of the property would operate for the benefit of Gibbs, the donor or seller of it, the property could not be condemned. And this, we think, it would not have been proper for the Court to say.

[5.] In every case in which a debtor transfers his property to defraud his creditor, a condemnation of the property to satisfy that creditor, would, in law, operate for the benefit of the debtor; for it would be the means of bringing about a payment of his debt; and that, too, with what, in law, would be another man's property. In law, the property transferred to defraud the creditor, would become the property of the transferee, as against the debtor himself. As to the debtor, it would be another man's property. But yet, the Statute of the 13th Elizabeth, gives the creditor the right to subject the property to the payment of a debt of that debtor's.

But while we say this, we do not mean to say that we think that if Gibbs had paid off the fi. fa. or if there existed any arrangement by which the money to be collected on the fi. fa. was to be his, and not the creditors, the property could be condemned. We do not think so.

[6.] When a Court gives in charge to the Jury a written request, by reading the request slowly to the Jury, and saying I give you that in charge; if there is anything objectionable in the manner of the Court's giving the charge, it is something which cannot be made apparent by written description; at least, it is something which has not been made apparent, in the description of the manner of the Court contained in this bill of exceptions.

[7.] A verdict may be corrected in mere matter of form, after the Jury have dispersed. (Judiciary Act of 1799, Prince's Dig. 421; Amendatory Act of 1818, Id. 442.) And it seems that the correction of the verdict, in this case, was a mere matter of form.

On two grounds only, then, do we think that there should be a new trial. These have been indicated.

Sledge rs. Lee.

No. 72.—NATHANIEL SLEDGE, plaintiff in error, vs. Joseph A. L. Lee, defendant in error.

[1.] Before the defendant in attachment can maintain a suit on the bond, he must, by a previous recovery against the plaintiff, ascertain his damages.

Debt, in Muscogee Superior Court. Tried before Judge WORRILL, 19th January, 1856.

This was an action brought by Sledge against Ingoldsby, Bosseau & Halsted, principals, and Joseph A. L. Lee, surety, on an attachment bond, for damages for suing out an attachment. Lee only was served. On the trial, plaintiff offered in evidence the affidavit and bond, (made by H. Holt, Attorney for plaintiffs in attachment, and Lee as surety,) to which defendants objected, unless Counsel for plaintiff would state he expected to show that there had been a recovery for damages against the principals. It being admitted there was no such recovery, the Court ruled out the evidence, and non-suited the plaintiff. This decision is assigned as error.

DOUGHERTY, for plaintiff in error.

H. Holt, for defendant in error.

By the Court.-LUMPKIN, J. delivering the opinion.

[1.] The single question in this case is, has the defendant in attachment the right to maintain an action on the bond, without first ascertaining his damages by a suit against the plaintiff in attachment? We hold that he cannot.

We fully appreciate the argument, ab inconvenienti, against this conclusion. And concede that in some cases it amounts to a denial of justice; for it is true, that attachments are frequently sued out by non-residents and transient persons,

Sledge vs. Lee.

whom it would often be difficult and sometimes impracticable, to sue; and therefore, if the language of the Act were doubtful, these considerations would induce us to hold that a previous suit was not necessary.

But the words of the Statute are so plain that we do not feel at liberty to put such a forced construction upon them. The obligors stipulate to pay "all costs which may be recovered by the defendant, in case the plaintiff suing out such attachment shall discontinue or be cast in his suit; and also, all damages which may be recovered against the said plaintiff, for suing out the same." (Cobb, 70.)

Can there be any breach of the bond until the damages are ascertained by a recovery against the plaintiff and a failure to collect them? Is not this the condition upon which, alone, the liability of the obligors accrues? And can there be an assignment negativing this condition, until it has been broken? And does not the radical defect in the opposite position, consist in holding that the right to recover depends upon a fact to be ascertained at the end of the suit, when, by the terms of the bond and of the law, it is made to depend upon a default which has already transpired?

But it is argued that this interpretation makes the Act contradict itself, in this: that the obligor's undertaking is limited by the penalty of the bond; and yet, the recovery against the plaintiff in the previous suit, may be for a larger amount. This may be, although it will seldom happen, inasmuch as the bond must be for at least double the amount of the debt attached; and the levying officer is not authorized to seize more property than is sufficient to satisfy the creditors. He makes himself liable for an excessive levy. The damages, therefore, will rarely exceed the penalty of the bond.

But suppose it were otherwise, how often does it happen in an action upon a bond, the actual damages proven exceed the penalty? Still, the recovery is necessarily limited by the penalty. Besides, the objection applies with equal force, supposing the action to be brought at once upon the bond. Will

Hunter, trustee, &c. vs. Davis.

not the measure of damages or recovery be the same under either mode of procedure? Still, the penalty cannot be transcended.

The litigation between these parties, has given rise, already, to two good Statutes. We trust this decision may show the necessity of a third.

Whether the defendant might succeed by stating a special case, either at Law or in Equity, or whether he be wholly remediless, it is not our province to say. We would recommend, however, that he invoke legislation for himself and all others similarly situated. It is the practical administration of the law that develops its defects and points out the remedy.

No. 73.—ABEL HUNTER, trustee, &c, plaintiff in error, vs. JOSEPH DAVIS, defendant in error.

[1.] A judgment is not a technical estoppel as to any matter, if the matter is not such that it had, of necessity, to be determined by the Court or Jury, before the Court could give the judgment.

Trover, in Harris Superior Court. Tried before Judge WORRILL, September Term, 1855.

On 14th February, 1824, Joseph Burks made a deed, by which he conveyed certain negroes and other property to his grand-children, and appointed John Burks as trustee, "in my stead to manage, take care of, keep together and sustain the said property with the increase, if any, purely and solely for the benefit and support of my said son-in-law and daughter, (Barton and wife,) and their children so mentioned as aforesaid, during the natural lives of my said son-in-law and daughter; to be administered to them for their support

Hunter, trustee, &c. vs. Davis.

and maintenance, in any manner my said son may deem most suitable," &c. Barton died, and his widow intermarried with Joseph Davis.

On 8th June, 1850, the children of Mrs. Davis filed a bill of ne exeat against her and her husband, alleging that they were interested in these negroes as remainder-men, and praying that the defendants might give bond and security for their forthcoming; also, for the removal of Burks, as trustee, and the appointment of another. The defendants, Davis and wife, denied any intention of removing the property, and set up their claim to the same, during the life of Mrs. Davis. The first decree rendered on this bill, required Davis and wife to give security for the forthcoming of the property, at the death of Mrs. Davis. The last decree on the appeal was, we, the Jury, find and decree, that John Burks, the trustee, appointed by said deed of trust, has not kept and performed his duty as trustee; and we further find and decree, that he be removed, and some other suitable and fit person be appointed trustee in his stead, to take charge of said property, and manage the same according to the provisions of said deed." Abel Hunter was appointed trustee; and subsequently, brought trover against Joseph Davis, for four of the negroes. On the trial of this action, the transcript of the record of this bill being in evidence, the Court charged the Jury, that the plaintiff being a party to the decree, was estopped from denying the right of the defendant to hold said negroes, until the expiration of the time at which defendant had proven his time to deliver them to complainants in said decree.

This charge is assigned as error.

RAMSEY & KING, for plaintiff in error.

INGRAM & CRAWFORD, for defendant in error.

By the Court.—Benning, J. delivering the opinion.

[1.] Was the charge right? This is the sole question.

Hunter, trustee, &c. vs. Davis.

A judgment is not, as we think, technically conclusive of any matter, if the matter is not such, that it had, of necessity, to be determined before the judgment could have been given. This seems to be the best result of the authorities. (1 Starkie's Ev. 223; Phill. Ev. 334; Notes to Phill. Ev. 845; (Note, 594, 826, 827;) Green. Ev. §528.)

Was the right asserted in the action of trover, such that it had, of necessity, to be determined by the Court in the Equity suit, before it could render the decree which it did render in that suit?

The decree which the Court did render in that suit, as between Davis and wife, and the complainants, amounted to this: that the complainants had the remainder in the slaves after the death of Mrs. Davis, and that they were entitled to security from Davis and wife for the forthcoming of the slaves, at the death of Mrs. Davis.

Now, in order that this decree might be made, it was not a matter of necessity that the Court should first determine the question, whether or not the complainants did not have, not only the remainder in the slaves, but also an interest in the slaves, jointly or in common with Davis and wife, for the life of the wife; or the question, whether, if they had such lifeinterest, the trustee under the deed was or was not entitled to the possession of the slaves, to the end that he might so administer them as to give all the tenants the enjoyment of The only question which it was necessary their interests. to determine to render that decree, was this: were the complainants remainder-men under the deed? If they were, the decree had to be rendered, as a matter of course, no odds whether they, together with Davis and wife, were also the life-tenants or not. For if the complainants were themselves life-tenants along with Davis and wife, still, Davis and wife were as much entitled to the possession of the slaves, for her life, as they were. If that were so, they, and Davis and wife, were joint tenants or tenants in common, of the life And one tenant in common, or joint tenant, has as much right to the exclusive possession of the property as an-

other has. And if one has the exclusive possession, the others cannot divest him of it. They may make him account for their interest in the profits, or may have a partition of the property. They cannot dispossess him. If they choose to let him keep the possession, they may do so. And if they do let him keep the possession, and ask that he may give them security for the forthcoming of the property at the end of the life estate, (they having the remainder in the property,) and get a decree that he shall do so, is the decree inconsistent with the idea that they had not a life-estate in the property? Certainly not. Therefore, should they afterwards choose to set up any right to the life-estate, that decree cannot be a bar to their claim.

It was, then, at least, not a matter of necessity, that the Court, before making the decree, which was made in the Equity case, should have determined the question, whether the complainants or the trustee under the deed, had or had not any life-estate in the slaves.

But whether they or the trustee have any such life-estate, is the question raised by the action of trover. The decree, therefore, can be no bar to that action.

The plaintiff in error ought, we think, to have a new trial.

No. 74.—THE COWETA FALLS MANUFACTURING COMPANY, plaintiff in error, vs. Curran Rogers, defendant in error.

^[1.] If A contracts with B to repair different parts of the machinery attached to the cotton factory of B, to-wit: the running machinery and two frames for spindles, the one not being dependent at all for its use upon the completion of the other, and the former is repaired and received by the owner, he cannot make the failure to deliver the other, an excuse for not paying for that which is finished and accepted.

- [2.] Any necessary expense, which one of two contracting parties incurs in complying with his part of the agreement, may be recovered as damages, in a suit for a breach of the contract.
- [3.] When an agency is once established, all that is done and said by theagent, in the execution of the contract, will bind the principal.
- [4.] Where the verdict is strongly and decidedly against the weight of evidence, a new trial will be granted.
- [5.] Prospective profits, which are speculative and conjectural, are usually too remote and uncertain to enter into the estimate of damages to be allowed for a breach of contract.

Complaint, in Muscogee Superior Court. Tried before Judge Workill, and motion for a new trial. Decided by Judge Workill, June Term, 1855.

Curran Rogers brought suit against the Coweta Falls Manufacturing Company, for damages caused by their failure to. comply with a contract to repair certain machinery belonging to the plaintiff. The contract was, that the machinery was to be repaired as soon as it could be done, or by 1st July, 1851, except two spinning frames, which were to be finished by 1st September, 1851. The work could have been com-. pleted by 1st July, 1851. The agent, Crockett, who made the contract, testified that he was stopped by the president. Only a portion of the work was done. The spinning frames were not touched; they were much injured by exposure and bad usage. Rogers' mill was idle some 50 or 60 days, in consequence of the failure of the manufacturing company to perform their contract. The agent of the company induced Rogers to send his machinery to Columbus for repair. lived in Thomaston, about 50 miles distant. Rogers' net profits from his mill would have been (the witnesses said) from \$12 to \$30 per day, if his machinery had been delivcred according to contract. He had employed hands, bought cotton and made all necessary arrangements to start his mills 1st July, 1851. Defendant below proved that all the machinery necessary to putting the plaintiff's factory in op-

eration, was finished and delivered early in the summer of 1851. The repairing of this machinery was worth \$300. The Jury returned a verdict for plaintiff, for \$2.320 40.

A new trial was moved for on several grounds-

1st. Because the Court, when requested, refused to charge: That if defendant repaired any portion of the plaintiff's machinery, and plaintiff received it as repaired, the plaintiff is bound to pay defendant the value of such repairs; but charged, that if plaintiff received a portion under the expectation of the balance being completed under the contract, and the balance was not completed, he was not bound to pay for any.

2d. The Court erred in allowing evidence as to the cost of transportation of the machinery to and from Columbus.

3d. Because the Court erred, after having excluded testimony of witnesses as to what they had heard Crockett say as to the terms of the contract, in allowing them to prove what was done under the contract.

4th. Because the verdict was contrary to the charge of the Court in this: that the Court charged, that if such part of the machinery as was necessary to the running of plaintiff's mill, was finished and delivered by the time agreed on, then the plaintiff could recover no damage for the stoppage of his mill.

5th. Because the damages are excessive.

The Court granted the motion, unless plaintiff would remit \$75, costs of transportation to and from Columbus, and \$440 damage done in such transportation, and from exposure while in Columbus.

The defendant refusing to receive this remitter, the Court over-ruled the motion for a new trial, and error is assigned thereon.

A. H. COOPER and H. HOLT, for plaintiff in error.

DENTON & Moses, for defendant in error.

By the Court.—LUMPKIN, J. delivering the opinion.

We cannot doubt the propriety of remanding this cause for a re-hearing. We propose to glance, cursorily, at the prominent points made by the bill of exceptions.

- [1.] All the material portion of the machinery was repaired and carried home by the owner; two spinning frames, only, being left unfinished. The value of the machinery thus repaired and received back, if the testimony of the witnesses is to be credited, made the cotton factory to which it belonged, worth to its owner, \$12 40 per day net posits. propelling machinery was not dependent, of course, upon the spinning frames. Now concede that Mr. Rogers received the propelling machinery under the expectation that the spinning frames would be repaired also, and they were not, is that a good reason why he should pay nothing for the propelling machinery? Did he derive no benefit from that which was finished? And shall he keep it and not pay for it?
- [2.] We do not think the Court erred in allowing evidence as to the cost of the transportation of the machinery to and from Columbus, at least as to the two spinning frames. They were transported to the shop of the company, under a contract, to be repaired. If they were not, this useless expense was incurred by Rogers, in consequence of the failure of the company to perform their undertaking. It, as well as the damage done to the spindles while exposed at Columbus, constitute legitimate items of damage for the violation of the contract.
- [3.] As to all that portion of the testimony which consisted of the acts and declarations of Crockett, we consider the rule to be this: it should have been submitted to the Jury to find, in the first place, whether or not the proof showed that Crockett acted as the agent of the company in making the contract? If so, then all he did and said in the execution of his agency, was admissible evidence, and bound his princi-

pal; otherwise, it should have been excluded from their consideration in making up their verdict.

[4.] That the verdict was contrary to the evidence as to the time the machinery was detained, there can be no doubt. According to the testimony of some of the witnesses, it was received at the time stipulated. By no interpretation of the proof can it be shown that it was delayed two months after the time stipulated for its completion; and yet, 60 days is assumed as the basis of the calculation for damages. Giving to the plaintiff the longest time proven, and the highest estimate as to profits, and the injury sustained, instead of being upwards of \$1700, could not have amounted to \$1200. On this branch of the case, we cannot doubt that the verdict was strongly and decidedly against the weight of evidence.

[5.] But was the basis upon which this judgment was rendered maintainable? It was founded almost exclusively upon speculative profits; it was a calculation upon conjectures, and not upon facts. We will not say that there is no case where the allowance of damages upon expectant profits is inadmissible; but we are quite sure that this is not one of them; the gains were too remote and uncertain, depending upon a variety of contingencies, the failure of any one of which would subvert the whole computation. Who will undertake to say and swear that a cotton factory in Georgia will pay expenses, much less yield a certain amount of net profits, for any given period? What a conflicting opinion and experience would such a question elicit! We are inclined to think that this whole testimony, as to the gains which the plaintiff would have derived from this contract, had he not been prevented from realizing them by the delinquency of the defendant, should have been rejected as too contingent and speculative, and too dependent upon the fluctuation of markets, the chances of business and other casualties, as to enter into a safe or reasonable estimate of damages. And in lieu thereof. a calculation should have been made of the loss actually sustained by the hire of hands, the interest on the investment, and solid data like these, as the criteria of loss by the deten-

Banks vs. Gidrot & Co.

tion of the machinery. We are aware that neither the English nor American Courts have been uniform in their adjudications upon this doctrine. Generally, the earlier decisions in both countries concurred in denying profits as any part of the damages to be compensated, and that whether in cases of contract or of tort. (2 W. Blackstone, 1078; 1 Exchequer R. 849; 11 Penn. S. R. 127; 1 Gallison, 314 and 325; 3 Dall. 338; 2 Wheat. 327; 3 Ib. 346 and 558; 5 Ib. 358; 17 Pick. 543; 1 Howard, 28; 21 Wend. 342; 3 Barb. S. C. R. 424.) But some of the more recent cases have doubted whether some of the precedents cited have not pushed the rule beyond the true line. (7 Hill, 62; 6 Barb. S. C. R. 419; 17 Ala. R. 689.)

Chancellor Kent says, that speculative profits are not allowed. (Vol. 11, 5th Ed. p. 480, in notes.) And perhaps the fable of the milk-maid in the spelling book, is the best illustration as to what is meant by this phrase.

No. 75.—John Banks, plaintiff in error, vs. Gidrot & Co. defendants in error.

Complaint, in Muscogee Superior Court. Tried before Judge Workill, December Term, 1855.

Gidrot & Co. sued John Banks on an account, for the price of a centre-vent water-wheel. On the trial, George Winter

^[1.] The price which an agent to sell fixes upon the commodity, is, as against the owner of it, evidence on the question, what is the value of the commodity.

^[2.] It is right in the Court not to require a Jury to regard what is, of necessity, the mere opinion of a witness.

Banks vs. Gidrot & Co.

testified, that he, as agent for plaintiffs, delivered the wheel to the wagoner of defendant; that a few days afterwards, the defendant said to him, that he had made a contract with H. A. Rozle, as the agent of plaintiffs, to furnish and put into operation such a wheel; witness replied, that Rozle had no authority to make any such contract; that his only authority was to sell. Witness was not present when Rozle was appointed agent, and had no personal knowledge as to extent of his authority, except from a letter he had received from plaintiffs. He proved the execution of the contract signed by Rozle, hereinafter named.

The defendant offered in evidence that contract, which was in writing, and signed by Rozle, and to the effect stated by defendant. Plaintiff's Counsel objected, because there was no evidence to show that Rozle was authorized to make such a contract. The Court sustained the objection, and defendant excepted.

Defendant's Counsel insisted, that Winter had proved that there was a special contract; and if so, plaintiffs could not recover in this action. The Court charged the Jury, that to defeat this action, it was not only necessary to show that there was a special contract, but also to show the terms of such contract. To this charge, defendant excepted. On these exceptions, error is assigned.

W. Dougherty, for plaintiff in error.

Moses, for defendant in error.

By the Court.—Benning, J. delivering the opinion.

If Rozle was agent to sell the wheel, he was agent to fix a price on it; he had power to agree as to the price of it.

[1.] It was proved, that he was agent to sell the wheel. The writing which was rejected, showed that he had put a price of not exceeding \$200 on the wheel. And what was

Banks vs. Gidrot & Co.

the value of the wheel, was in issue. And certainly, in the sale of a thing, the price put on it by one authorized to put a price on it, is to be considered as some evidence, that the value is not greater than that price.

On the question of the value of the wheel, therefore, we think that the writing was admissible.

The writing was of a somewhat singular kind. It was in these words: "I bind myself to furnish John Banks, a centre-vent wheel-mill," (mill-wheel?) "at his plantation, in Stewart County, for two hundred dollars, with all the appurtenances belonging—iron scroll-wheel, &c.; said Banks to have the frame of the house 16 by 24, and do the carpenter's work. I am to superintend the putting up the house, the dam, &c. and warrant the mill to grind one hundred bushels of corn per diem. 22 October, 1850. H. A. ROZLE.

for Gidrot & Co."

But we do not think that this writing was admissible for the purpose of showing anything else than what was the value of the wheel.

[2.] If a witness says there was a "special contract," without stating what the contract was, he, of necessity, gives what is mere matter of opinion. And in general, that is not evidence.

But even if a special contract had been proved in terms in this case, it does not follow that the plaintiff could not have recovered. By the Act of 1854, a plaintiff may amend his declaration at any stage of the cause, and in any matter, whether of form or substance.

We see nothing wrong in the charge.

But as the writing was rejected, we think there ought, on that account, to be a new trial. Brown ss. Roberts & Foote.

No. 76.—James W. Brown, plaintiff in error, vs. Roberts & FOOTE, defendants in error. James W. Brown, plaintiff in error, vs. E. F. Woods & Co. defendants in error.

[1.] Process sued out of the Inferior Court, bearing test in the name of one of the Justices, is sufficient and legal.

Application for certiorari. Decision by Judge Powers, 20th June, 1855.

Roberts & Foote sued James W. Brown in Dooly Inferior Court. The process bore test in the name of but one Justice. Brown applied to Judge Powers for a certiorari, in order to declare the said process void. The refusal to grant the writ, is the error assigned in this case.

The same is the only point made in the case of Brown vs. Woods & Co.

DAWSON, for plaintiff in error.

COOK & MONTFORT, for defendant in error.

By the Court.—McDonald, J. delivering the opinion.

[1.] The two cases above stated, depending on the same point, were consolidated.

The Judge, in our judgment, very properly refused to sanction the writs of certiorari. The processes bore test properly. The Act has reference to process issued from the Superior and Inferior Courts. The Superior Courts have but one Judge; the Inferior Courts have five Justices. There might have been some plausibility in the exception, if the Statute had declared that the process should bear test in the name of the Judge or Justices of such Court. Instead of that, it directs that it shall bear test in the name of one of the Judges or Justices of such Court.

Judgment affirmed.

Kelly vs. The State.

No. 77.—Francis Kelly, plaintiff in error, vs. The State of Georgia, defendant in error.

- [1.] The fact that the Judge reprimanded a Jury taken from the same list, for their misconduct in acquitting the same defendant in another case, is no ground of erors, in a subsequent trial, there being no exception to the pannel on that account.
- [2.] In selecting a Jury from the two panels, the defendant is entitled toseven, and the State five strikes; and they should alternate, the defendant beginning and ending the strikes.
- [3.] It is the privilege of Counsel and the duty of Courts, to propound such questions to reluctant witnesses, as will strip them of the subterfuges to which they resort to evade telling the truth.

Misdemeanor, in Bibb Superior Court. Tried before Judge Powers, June Term, 1855.

This indictment was for keeping an open tippling house on the Sabbath day.

One of the witnesses stated, that he could not say there was spiritous liquor in the decanters, &c. in the shop, as he had never tasted any in that house. The Judge asked him if he could not say there were spirituous liquors in the Lanier House bar. This question was objected to as irrelevant, and made a ground for a new trial.

Another ground for a new trial was, that the Judge had lectured a portion of the Jury for a verdict of acquittal, rendered on another indictment, against the same defendant. No objection was made to these Jurors.

Another ground was, that only one witness proved the offence, and he was successfully impeached, and not sustained. The Court refused a new trial, and defendant excepted.

LAMAR & LOCHRANE, for plaintiff in error,

Sol. Genl. DEGRAFFENREID, for defendant.

VOL. XIX-54

Kelly w: The State.

By the Court.—LUMPKIN, J. delivering the opinion.

We see no error in this record. Whether the house where the liquor is charged to have been sold, was a tippling house, and whether the defendant kept it open on the Sabbath, are questions of fact, which were submitted to the Jury and passed upon by them. And we think there was sufficient evidence upon both points to sustain the verdict.

- [1.] What Judge Powers may have said to the Jury in another case, we do not think is properly the subject of review in this. No exception was taken to the panel on that account.
- [2.] As to the mode of striking the Jury, the usual and better practice is, to let the defendant and the State alternate, the defendant beginning and ending. This will give the defendant seven strikes, and the State five, the number allowed by law to each.
- [3.] The witness, Adderhold, was evidently disposed to stick in the back, to say the least of it. The Court saw this. And to extract the truth, inquired of him, if he had ever been in the bar of the Lanier House, and whether he did not know that there was liquor there in the bottles, although he did not drink of it? Thus pressed, he defended his position, by explaining what he meant to say. It is the privilege of Counsel, and the duty of Courts, to strip reluctant witnesses of these miserable subterfuges to conceal the truth.

Powers et al. vs. Armstrong et al.

- No. 78.—VIRGIL POWERS and others, plaintiffs in error, vs. JAMES W. ARMSTRONG and others, defendants in error.
- [1.] The Legislature cannot divest an individual of his property, against his will, without providing or paying a just compensation for it.
- [2.] A party whose property is taken by an incorporated company, for the use of the company, maintains to it the relation of owner, until he is paid—his is the ownership and not a lien.
- [3.] The builders of a bridge, for an incorporated company, on the land of a third person, knowingly, can have no lien against the owner of the land; nor can a judgment obtained by him against the company, have a lien thereon, the land never having been the property of the company.

Application for injunction, in Macon Superior Court. Decision by Judge Powers, at Chambers, 15th November, 1855.

This bill was filed by Virgil Powers, Daniel W. Vischer and Jacob G. Vischer, alleging that in 1852, the Legislature incorporated "The Oglethorpe Bridge & Turnpike Company," for the building a bridge and turnpike across the Flint River, near the City of Oglethorpe; that by the charter, a provision was made for ascertaining the value of land taken for this purpose; and the award provided therein, was to operate as a judgment against the company, and be enforced by execution; that in March, 1853, James W. Armstrong filed his bill against the company, alleging that he owned lands on both sides of the river; and also, a ferry worth \$15.000, which would be utterly destroyed by the erection of the bridge; that the destruction of timber by the company, would amount to \$3.000 more. The bill prayed a perpetual The injunction was afterwards, by order of the injunction. Court, dissolved, by the company's giving bond, with good security, to the amount of \$20.000. On 21st December, 1853, complainants contracted with the company for the building of their bridge, and proceeded to do the work; and that on a settlement, on the 13th January, 1855, the company acknowledged themselves to be due to complainants, the sum

Powers et al. vs. Armstrong et al.

of \$9.808 04. The bill farther charged, that Armstrong failed and refused to have his damages assessed under the charter, until complainants had made considerable progress in their work, and then certain appraisers were appointed, who awarded to Armstrong \$6.000. The bill suggested that this award was void—1st. Because the appraisers were sworn by a Notary Public; and 2d. Because the award did not set apart any specified quantity of land, as required by the charter. From this award, the company appealed, and the proceedings were dismissed. Subsequently, Armstrong, of his own accord, summoned the same appraisers, who made the same award again. The company again appealed.

At September Term, 1855, of Macon Superior Court, complainants obtained a judgment against the said company for the said balance due them; but the Court having adjourned till 2d Monday in January, 1856, a ft. fa. could not issue thereon. At October Term, 1855, of Dooly Superior Court, Armstrong knowing the foregoing facts, fraudulently combined with the company to release them from all damages, on the Macon County side of the river, if they would confess judgment for the said last award of \$6.000; and farther agreed, also, to release certain of the securities to the said bond of At the same term, an order was taken by the frau-**\$**20.000. dulent consent of said parties, appointing three commissioners to sell the bridge and the land attached thereto, for cash, on 1st Tuesday in December, 1855; that this confession of judgment was made by two Attorneys, who were securities on the said bond for \$20.000, without the consent or authority of the company. Complainants charge that theirs is the oldest judgment lien; and moreover, in Equity, they are entitled to a lien, as the builders and furnishers of materials for said bridge; that Armstrong ought, at least, to be compelled to exhaust the fund provided for him, in the bond for \$20.-.000, before appealing to this, the only fund of complainants. The prayer was for an injunction.

Judge Powers refused to sanction the bill, and this decision is assigned as error.

Powers et al. us. Armstrong et al.

SCARBOROUGH; MILLER & HALL, for plaintiffs in error.

FISH, for defendants.

By the Court.—McDonald, J. delivering the opinion.

The complainant contracted with the Oglethorpe Bridge & Turnpike Company to build a bridge across Flint River, at or near the ferry known as Traveller's Rest Ferry. proceeded with their contract, and built the bridge on the land of James W. Armstrong, the defendant. The company and Armstrong could not agree as to the value of the land, and a proceeding was instituted under the charter to assess it, which resulted in the confession of judgment by the company to Armstrong, in the sum of \$6.000; which proceedings, the complainants charge to have been collusive, irregular and fraudulent; and that the damages were excessive and exorbitant, and that the company is insolvent. The Circuit Judge refused to sanction a bill praying an injunction, and that refusal is made the ground of error. A few leading views of the prominent points which appear in the record, will be sufficient to determine the propriety of the decision of the Court. Armstrong, the defendant, is the owner of the land on which the bridge is built; he has never been paid for the land on which it is erected; he has got a confession of judgment against the company, and the company, according to complainants' allegations, is insolvent. Complainants have obtained judgment also, on their contract with the company, for building the bridge. An appeal has been entered from that, and complainants claim a lien superior to defendants.

[1.] It was insisted in the argument, that under the law, the confession of judgment by the company to Armstrong, vests in the company the fee simple title to the land in question, and leaves to Armstrong a judgment against the company, as the consideration for his land. If the literal construction of the Act be the true one, and if that be the literal

Powers et al. vs. Armstrong et al.

construction of it, we have no hesitation in saying it is void. The Legislature cannot thus divest a man of his property, against his will, without compensation. It is still Armstrong's property.

- [2.] The title to the land, then, is still in Armstrong; it has never been out of him; his is not a lien, but a property. Does the judgment obtained by complainants against the company, create a lien on Armstrong's property? That cannot be, for Armstrong is no party to the judgment; and the property upon which it is said the lien attaches, is not now, nor has it ever been the property of the defendant. But it is said that they have a lien as builders of the bridge, superior to Armstrong's lien.
- [3.] That cannot be, for Armstrong has no lien; he owns the property; they can have no lien as builders, for they built the bridge on Armstrong's land, knowing that it was They stipulated with the company that they should secure the right of way to build said bridge, and if they, complainants, were delayed or prevented by legal process from building the bridge, the company should pay for all work done, and damages sustained by complainant. There was no expenditure of money here, through inadvertence or mistake The complainants knew that they were not expending money or labour on their own land, or the land of the com-The bridge was not built there by the request or acquiescence of Armstrong. He opposed it and enjoined, all the time contending against it. The bond which was given. was not at the instance of Armstrong. It was given in compliance with a conditional order for an injunction, and upon the execution of which, the injunction was to be dissolved; and it is extremely questionable, for reasons not necessary to state here, if it be recoverable, even if the defendant were disposed to resort to it. The bill does not present the case of one creditor, who has two funds from which he may satsify his debt, and another party who has a lien on one of the same funds for another debt. It is quite different. The land is Armstrong's. He has never bargained it away, and it has

Powers et al. ps. Armstrong et al.

not been taken by the company in a manner to deprive him of his title, or to vest it in the company; and all these things were known to complainants when they expended their money and labour upon it. The judgment of the Court below must be affirmed.

There are allegations in the bill, however, which should have some weight, as entitling the complainants to some kind of relief; but standing alone, they would not justify the Chancellor's interfering by injunction, or, indeed, in making a decree of any sort in their favor. After the first decree was set aside, the defendant, although one of the commissioners had declined to act, prevailed on the same commissioners to make a new award. They awarded the same amount, \$6.000. From this award the company appealed; and then it was, the complainants charge, that the collusive and fraudulent confession of judgment was made for an exorbitant and excessive amount of damages, and to their injury. These are thecharges, substantially. One part of the agreement was, that Armstrong obliged himself to make the bridge bring the \$6000, and had released all other damages. These facts are alleged upon information and belief. If true, does it change the title to the property? Not at all. The purchaser, at the sale, would have had a clear equity against Armstrong, and might have compelled him to execute a title; but the title had not passed under the charter, because it could not pass until Armstrong was paid; and if the charter contemplated that it should pass without payment, for so much, it is void. this contract, under which alone the purchaser would have had an available equity, the complainants seek to set aside. They charge it to be a nullity.

The Oglethorpe Bridge & Turnpike Co. still exists. Armstrong has taken steps to get pay for his land, taken by the company, and has obtained a judgment on confession—not on the verdict of a Jury. And that confession is charged to be fraudulent. If he gets just compensation for his land, &c. it is all he is entitled to. His is a voluntary proceeding, under the charter, to do this. If the landings and land taken

McDaniel w. Strohecker.

for the turnpike, and damages he is legally entitled to, are worth landings, land for turnpike, ferry-bridge and all, it is right that he should have them; if not, he should have what they are worth, legally and fairly assessed; and before he is thus paid, the complainants have no right for their demand to proceed against that property. We have therefore, in this case, determined, that while we affirm the judgment of the Court below, the complainants may be allowed so to amend their bill as to entitle them to an injunction, by stating the value of the right of way of defendant, Armstrong, and his land taken for the abutment of the bridge, including all damage he is entitled to under the charter; and tendering the amount thereof to the said Armstrong, in the same manner as if it were a bill for the specific performance of a contract, stating, further, the value of the bridge as it stands.

No. 79.—David McDaniel, plaintiff in error, vs. E. L. Stro-HECKER, defendant in error.

Deceit, in Bibb Superior Court. Motion for a new trial. Decided by Judge Powers, November Term, 1855.

This suit was brought by David McDaniel vs. Ed. L. Strohecker, for decit in the sale of a negro girl Ellen, in representing her to be sound, when, in fact, she was laboring with consumption, which was well known to defendant,

The abstract of the testimony was as follows:

^[1.] If the verdict is not supported by the evidence, to grant a new trial is proper.

^[2.] The judgment granting a new trial, is not affected by a failure in the Judge to enter on the minutes his reasons for the judgment.

McDaniel vs. Strobecker.

G. J. Blake, as agent for plaintiff, bought the negro Ellen of defendant. Defendant refused to warrant the soundness of the negro, saying that he knew nothing to the contrary of her being sound, but that he had heard of persons suffering unjustly from warranties. Defendant offered to take \$700° for her; witness reported to plaintiff, who finally said he would close the bargain (after examining the negro) and take the risks. There were no marks then on her breast; the negro had a vial of cherry pectoral in her bosom; defendant is a physician, and plaintiff a dealer in negroes; the bill of sale was made to witness; the negro, with a full warranty of soundness, was worth \$800; plaintiff sold the negro to defendant some two years previously; the last trade was made in February, 1854.

Dr. Ricks saw the negro 25th May, 1854; she was then in second stage of pulmonary consumption; she is now dead; saw marks of blistering and cupping on her breast; could not say how long she had been suffering with this disease.

Joel Price, a farmer, saw the negro last of February, 1854; she was then in very bad health; does not know how or when she died.

R. Bunn, farmer and merchant, saw the negro shortly after her arrival in North Carolina; she was then sick and feeble.

The Jury found a verdict for the plaintiff for \$700, with interest; whereupon, the Court granted a new trial, on the grounds—

1st. That the verdict was contrary to the charge of the Court.

2d. That it was contrary to the law and evidence.

3d. That it was strongly against the weight of evidence.

This decision is assigned as error.

POE & GRIER, for plaintiff in error.

RUTHERFORD, for defendant in error.

VOL XIX-55

McDaniel vs. Strohecker.

By the Court.—Benning, J. delivering the opinion.

Was the verdict against the evidence, or strongly against the weight of the evidence? If it was either, the judgment of the Court below granting the new trial, was right.

The verdict was for the plaintiff; the action was for an alleged deceit in the sale of a slave as sound, when she was not sound.

To support such an action, it is necessary that the plaintiff prove that the slave was unsound, that the defendant knew this, and that the plaintiff did not know it.

Now the evidence authorizes, if it does not require, the inference, that the plaintiff knew as much about the condition of the slave as the defendant did, and that both the plaintiff and the defendant suspected her soundness.

Blake, the plaintiff's witness, swore "that the negro. during the negotiation, was sent by defendant to plaintiff, that he might examine her; that plaintiff was a negro dealer;" that plaintiff did examine her; that while doing so, the girl took from her bosom "a vial of cherry pectoral (which was labelled as good for a variety of complaints) and set it on the counter; that plaintiff then asked him if defendant was a man whose word could be relied on, and witness replied yes, I think so; that plaintiff then requested witness to go and offer \$700, if the defendant would warrant the health, or \$600 without any warranty; that witness went and made such offer, but defendant refused to change his terms, to-wit: \$700 without warranty of health; that he reported it to plaintiff, who authorized him to go and close at \$700 without warranty, saying I will take her and risk it, or I will take the chances;" that the bill of sale did not warrant the girl's health, but "warranted every thing else." "Witness further said, that he knew the girl, and considered her, as to her qualities, rather a trifling negro; but that, from her appearance, if there had been no suspicion of unsoundness, she would have brought \$800; that he thought the plaintiff, who McDaniel vs. Strohecker.

knew her, having sold her (hear his partner) some year and a half or two years before, to defendant, would have given \$800 for her if there had been no suspicion of unsoundness, but that witness would not have given so much, for the reason just stated, that he, witness, knew the girl, but knew of no unsoundness or disease, or of her having been treated for any disease."

It is plain that this evidence authorizes the inference which I have said that it does.

[1.] And if that be so, the evidence does not support the verdict; for to support the verdict, the evidence ought, at least, to show that the plaintiff knew less about the condition of the slave than the defendant knew; and it ought not to show, that both the plaintiff and the defendant had reason to suspect the soundness of the slave; and that, on account of that suspicion, the price was made lower.

We think, therefore, that the new trial was properly granted. Nor do we think that the judgment of the Court below, granting the new trial, was affected by the failure of "the Judge allowing the same" to "enter on the minutes of said Court his reasons for the same."

It is true that the Constitution of the State requires a Judge, when he grants a new trial, to do this. (Cobb's Dig. 1121.) But it does not say, that unless he does it, the judgment granting the new trial shall be void.

And we regard the clause of the Constitution requiring this to be done, as merely directory. If so, a failure to observe the clause, is not a thing for parties to complain of; not that we mean to say that it is a thing to be complained of in any quarter. That point is not for us.

We think the judgment of the Court below ought to be affirmed.

Reynolds vs. Jordan, adm'r, &c.

No. 80.—CHARLES S. REYNOLDS, plaintiff in error, vs. EDWIN T. JORDAN, adm'r, &c. defendant in error.

[1.] In attachment, the defendant, on the day of levy, replevies the property; and the Sheriff thereupon, omits to advertise the levy: *Held*, that this omission does not affect the validity of the subsisting suit against the defendant.

Attachment, in Crawford Superior Court. Decision by Judge Powers, September Term, 1855.

In this case, the defendant moved to dismiss the attachment on the ground, that the levy was not advertised as required by the Statute; it appearing that the defendant had replevied the goods as soon as the attachment was served. The Court refused the motion, and this decision is assigned as error.

NORMAN, for plaintiff in error.

CULVERHOUSE, for defendant in error.

By the Court.—Benning, J. delivering the opinion.

The effect of the replevy was to dissolve the attachment; that is, was to render void the attachment; and was also to substitute for the attachment thus rendered void, another contrivance for effecting the object of the attachment—an appearance. This substitute was the personal obligation of the defendant to appear, "and to abide by, and perform the order and judgment" of the Court.

Suppose, therefore, that we admit that the failure to advertise the levy made void (if it be possible to make void that which is already void) the attachment; how did that affect the thing which, before the attachment was made void, was substituted for the attachment? Manifestly, in ne way. It

The C. R. R. & B. Co. vs. Davis.

is no where said, that this shall be void for a failure to advertise the levy.

Besides, when the defendant took upon himself the personal obligation aforesaid, all was done which an advertisement of the levy could have accomplished. Such an advertisement can serve no other purpose, in cases of attachment, than to induce the appearance of the defendant. When the defendant has appeared—has not only appeared, but has given bond and security to abide the judgment in the case, that purpose is more than accomplished. (Cobb's Dig. 71.) We think the judgment of the Court below oughs to be affirmed.

- No. 81.—THE CENTRAL RAIL ROAD & BANKING COMPANY, plaintiff in error, vs. BENJAMIN DAVIS, defendant in error.
- [1.] A rail road company is bound to use ordinary care in running its trains, to prevent them from coming in collision with the person or property of another; and this it is bound to use, even if that other is, on his side, in some degree negligent; therefore, if damage happens to such other person, by a collision which the company, by the use of ordinary care, might have prevented, the company must make good the damage.

Complaint, in Bibb Superior Court. Tried before Judge Powers, November Term, 1855.

This was an action brought by B. Davis vs. The Central R. R. & B'k'g Co. for the value of two mules killed by the cars of the company. It appeared that the mules were loose, and getting on the track, were overtaken by the train and killed. The evidence was conflicting as to the diligence used to lessen the speed of the train. Counsel for defendant requested the Court to charge the Jury—"That although cattle, hogs, goats, &c. may run at large and rail road compa-

The C. R. R. & B. Co. vs. Davis.

nies be made liable for killing them, yet mules, being of a peculiar nature, should be kept up by the owner; and if allowed to run at large, as in the open woods, and they are killed by rail road trains, (except in cases of gross negligence,) the rail road company will not be liable."

The refusal to give this charge, is the only error assigned.

Pos, for plaintiff in error.

STUBBS & HILL, for defendant in error.

By the Court.—Benning, J. delivering the opinion.

In The Macon & W. R. R. vs. Davis, (18 Ga. R.) this Court held that a rail road, in running its trains, is bound to exercise ordinary care to prevent them from damaging person or property by collision; and that if by the exercise of ordinary care it could have prevented a collision, it is liable for the loss occasioned by the collision, even although the person sustaining the loss may have been, on his side, also guilty of the want of some degree of care. This, we still think, a true proposition.

And it is applicable to this case. The owner of the mules was guilty of some degree of negligence in letting them run at large in the vicinity of the uninclosed rail road track; and when they got on the track, that made him, I think, a trespasser against the rail road company. He had no right to have his mules on that track.

But then, on the other hand, the company had no right to kill the mules merely for being there. If the company had chosen to take its redress into its own hands, it might, by the Common Law, have distrained the mules and held possession of them, until the owner made it reparation for the trespass. More than this the company would not have done without disregarding the Common Law. (3 Black. Com. 7; Viner's Abr. "Distress"; Lindon vs. Hooper, Coup. 414.)

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The C. R. R. & B. Co. . Davis.

And as much as this the company could not have done, without disregarding our Provincial Act of 1759, "for the better regulating fences in the Province of Georgia"; for that Act declares that the owner of cattle shall not be liable to answer for damage done by the cattle on another man's land, unless the land be inclosed by a fence "six feet high." If, therefore, such cattle should be distrained by the owner of the land, he would not be entitled to keep the cattle until he had been paid the damage. He would not be entitled to any pay for the damage. Such would be the effect of the Statute.

This Act further declares, that if any person shall kill, maim, hurt or destroy cattle, doing damage in "any garden, orchard, rice ground, indigo field, plantation or settlement," not fenced by such a fence as the Act prescribes, he shall make good to the owner thereof the damages which he may sustain by the killing or maiming, &c. of such, his cattle. (Cobb's Dig. 18.)

The company, it is certain, had not the right to kill the mules merely because the mules were on its track. It is not every injury that will justify the taking of life, whether it be the life of man or beast. If a man strikes another with his fist, without provocation, it is an injury to the other, but it is not one which authorizes him to slay the striker. So, if a man's horse happens to break into another's field, it is an injury to the latter, but it is not one which authorizes him to kill the horse.

We do not know of any law which puts mules, in respect to the course lawful to be pursued towards them, when doing damage on land not belonging to their owner, on a footing different from that on which the law puts other cattle.

Notwithstanding, then, that the owner of these mules may have been guilty of some degree of negligence in suffering the mules to run at large in the neighborhood of this uninclosed rail road track, yet, that did not excuse the rail road company from the observance of ordinary care in running its train, to prevent it from striking against the mules.

The M. & W. R. R. Co. se. Winn.

If this be so, the refusal of the Court below, to give the request in charge to the Jury, was manifestly right.

So the judgment of refusal ought to be affirmed.

No. 82.—The Macon & Western R. R. Co. plaintiff in error, vs. Malinda Winn, defendant in error.

[1.] If a collision happens at a crossing of a rail road and a public highway, and both parties are negligent, and the plaintiff, in the exercise of common care and caution, could have avoided the injury, he shall not be entitled to recover of the defendant, notwithstanding he also was in fault.

Action for damages, in Bibb Superior Court. Tried before Judge POWERS, November Term, 1855.

This action was brought by Malinda Winn, a minor, 8 years of age, by her next friend, vs. The M. & W. E.E. for damages done to the plaintiff, by the engine and cars of defendant. It appeared, that plaintiff's mother and her children were in a carriage drawn by two mules and delicate by a negro man. That being near the crossing of the road, and hearing the cars, Mrs. Winn directed the negative wait till the train passed. He said he could cross before it reached the spot, and endeavored to do so. When the carriage was immediately on the track, the mules became alarmed and refused to move. The engine ran over the carriage, killed the driver, the mules, three of the children, and fractured the skull of plaintiff; from which fracture, her right eye became smaller than the other, and she is disfigured for The evidence was conflicting, as to the engine runner making any effort to stop the train. A good deal of testimony was offered on either side. Counsel for the company, The M. & W. R. R. Co. M. Winn.

requested the Court to charge, among other things, "That if the plaintiff and defendant are both found to be negligent, and the plaintiff could have avoided the effects of defendant's negligence in the use of ordinary diligence, and did not, then the defendant is not liable."

The Court said, "That it did not exactly comprehend the application senght to be made of this request. If plaintiff could have extricated himself from defendant's negligence at all, then he was not in fault at all; for whether on or off the read, he had a right to be there. But to apply it to this case, I take it to be a sound and reasonable rule of law, viz: If the Jury believe the negro was in fault in attempting to cross the track at that particular time, and that defendant was also in fault in his approach; and if they believe that the carriage, being on the track, could have been gotten off by the driver, or its inmates removed by ordinary diligence, and they did not, then there is no liability; and in fact, I should say, if they could have saved themselves by the utmost effort, and did not exert themselves, the defendant would not be liable. To this extent, this request is given in charge."

The charge as given, and the refusal to charge, are asaismed as error.

The Jury found for the plaintiff a verdict for \$7.000. A motion for a new trial, on the ground of excessive damages, was over-ruled; and this, also, is assigned as error.

COLE; NISBET, for plaintiff in error.

E. TRACY, for defendant in error.

By the Court.—LUMPKIN, J. delivering the opinion.

[1.] Our judgment in this case is, that it was error in the Court not to have given the *third* charge, as requested by Counsel for the defendant; and that a new trial, on that ac-

The M. & W. R. R. Co. es. Winn.

count, should be granted. It contains, we think, the law which should control this case.

When the case of the Macon & Western Rail Road Co. against Davis, was before this Court last August, the great question then argued and decided was, to what degree of diligence the company was bound? The Circuit Judge had held, that the utmost diligence would alone excuse the company; whereas, in the opinion of this Court, they were liable only for want of ordinary care. We went further, and held, that notwithstanding the plaintiff was not free from fault, still, if the defendants, in the exercise of due care, could have prevented the injury, they would be responsible. We adhere to that decision.

But the proposition is now made for the first time; suppose the plaintiff, in the exercise of ordinary diligence, could have avoided the casualty, conceding there is fault on both sides, can there be a recovery?

This Court held, in Brannan vs. Mays, (17 Ga. Rep. 136,) that notwithstanding the defendant was in fault, the plaintiff was not entitled to recover, if, in the exercise of ordinary diligence, he could have avoided the injury; and that, too, where the plaintiff was wholly innocent: A fortieri, can he not recover, if he be at fault himself, provided he could, in the exercise of ordinary diligence, have escaped the mischief? Is this sound law?

In Butterfield vs. Forester, (11 East. 60,) Lord Ellenborough said: "A party is not to cast himself upon an obstruction which has been made by the fault of another, and avail himself of it, if he do not, himself, use common and ordinary caution to be in the right." And the reported cases in support of this doctrine, are overwhelming. (Flower vs. Adam, 2 Taunton, 314; Clay vs. Wood, 5 Esp. 44; Mayhew vs. Boyce, 1 Starkie's Rep. 423; Riddle vs. Merrimack Locks, &c. 7 Mass. Rep. 183; Lane vs. Crombie, 12 Pick. 177; Thompson vs. Bridgewater, 7 Pick, 188; Harlow vs. Hermiston, 6 Cowen, 191; Bush vs. Braniere, 1 Cowen, 78; Noyes vs. Morris, 1 Vermont, 353; Chapting.

The M. & W. R. R. Co. . Winn.

Hanes, 3 Carr & Payne, 554; Pluckwell vs. Wilson, 5 Ib. 375; Sutton ve. Clarke, 6 Taunton, 29; Jones vs. Boyce, 1 Starkie's Rep. 493; Wadsworth vs. Willan, 5 Esp. R. 273; Steele vs. Inland, Western Lock Navigation Co. 2 Johns. R. 283; Town of Lebanon vs. Olcott, 1 N. Hamp. Rep. 339; 3 M. & W. 248; 10 Ibid 548-'9; 2 Amer. R. W. Cas. 114; 1 M. & Cromp. 20.) Many of these cases are cited in Wheaten's Edition of Selwyn's Nisi Prius; and the principle is adopted in the text, that to entitle the plaintiff to an action for damages for an obstruction, he must show that he acted with common and ordinary caution. same rule holds in cases of negligence, in the management of ships, whereby a loss accrues. (Luxford vs. Large, 5 Carr & Payne, 106; Handayside vs. Wilson, 3 Ibid, 528; Vennall vs. Garner, 1 Crompt. of Mees. 21.) The case of Washburn vs. Tracy, (2 Chip. 136,) is a strong case upon this point. There it was held, that "if but for the want of ordinary care in the plaintiff, in his use of the road, the injury would not have happened, the verdict should be for the defendant, notwithstanding he also was negligent."

Spencer vs. the Utica & Schenectady Rail Road Company, (5 Barbour, 337,) decides the precise question before us. In that case, it was held by the Supreme Court of New York, that in an action on the case against a rail road company, to recover damages for injuries sustained, in consequence of their negligently running their train of cars against the plaintiff's wagon, while he was crossing the rail road track, in order to warrant a recovery, it must appear that the defendant's agents were guilty of negligence, and that the plaintiff was, himself, free from negligence or fault.

And Mr. Justice Gridley, in delivering the opinion of the Court, says: "It was equally necessary for the plaintiff to establish the proposition, that he, himself, was without negligence, and without fault." This is a stern and unbending rule, which has been settled by a long series of adjudged cases, which we cannot over-rule if we would. (Citing 1

The M. & W. R. R. Co. es. Winn.

Cowen's R. 78; 6 Hill, 592; 19 Wend. R. 399; 6 Cowen, 189, 184, 191; and 5 Hill, 282.)

Indeed, the Circuit Judge admits the principle, but fell into the fatal error, as we conceive, of restricting the use of ordinary diligence, on the part of the plaintiff, to the point of time when the carriage was on the track, and when the driver seems, from the evidence, to have applied the whip vigorously to urge the mules forward, but in vain; whereas, he should have made it cover the whole transaction, from the commencement to the termination of the catastrophe.

The only authority which seems to be in opposition to the principle contained in Brannan & Mays, is contained in & short passage in Buller'z Nisi Prius, p. 26, which is in these words: "If a man lay logs of wood cross a highway, though a person may, with care, ride safely by, yet, if, by means thereof, my horse stumble and fling me, I may bring an action." But the criticism of Chief Justice Parker upon this citation, shows that it is not repugnant to the principle of the great current of English and American cases, upon this subject. And that the meaning is, that notwithstanding a person using due care, may possibly pass the obstruction without injury, nevertheless, if one is injured, that is, if one who uses this care, does, by misfortune, suffer from the obstruction, he may recover. And the learned Judge further shows, that the cases cited by Buller, from' Cro. James and Carthew, do not support his position, if he meant to say that a man might recover for an injury by an obstruction, without showing ordinary care on his part.

Is there any conflict between Brannan & Mays, and The M. & W. R. R. Co. and Davis? We do not perceive it. The two may, and do, well stand together. To illustrate, suppose the company and Mrs. Winn were both in fault, the rail road, in running at a speed beyond schedule time in approaching this crossing, and Mrs. Winn, in using a driver, who, from the use of liquor, or some other cause, rofused to obey her command when she directed him to stop; and suppose the defendant could, but did not stop their train, to available.

The M. & W. R. R. Co. vs. Winn.

the collision, when they saw the carriage of the plaintiff approaching dangerously near, she using all proper diligence to prevent the contact. In that case, the decision in The M. & W. R. R. Co. vs. Davis, would have its effect; and the plaintiff would be entitled to recover. But again, let it be assumed that both are primarily negligent, as we have just stated, and the rail road puts forth all reasonable exertion to escape the disaster; but Mrs. Winn, observing no such care, madly rushes on to the collision. In this case, the ruling in Brannan & Mays would take effect, and the plaintiff could not recover.

Instead of repugnance, we see nothing but harmony. It is but the application of the same rule to both parties. It presents no impracticable issue to the Jury, but will work in every imaginable case justly and well. We believe it to be a useful and salutary principle, that in order to entitle a party to damages, he must not be directly nor indirectly the author of his own wrong. He must not voluntarily incur the injury of which he complains; and not to prevent it by ordinary care, is to court it.

In Palmer vs. Barker, (2 Fairfield, 338,) it was held, that where two persons are travelling with carriages in the road, and about to meet and pass each other, each is bound to pass to the right of the centre of the travelled road; and in so doing, to use ordinary care and diligence; and if one of them, by omitting this care and caution, be injured in his person or property, he is without remedy; and if he injure the other, he will be liable in damages.

Here are two roads crossing each other, the rail road and the public highway. The company have the exclusive right to use the rail road; every citizen has a right, in common, to travel the highway; each sees the other advancing, neither will stop, and a collision ensues; who is to blame? Common sense says both; and the law, in conformity with common sense, declares, that if both parties are equally in the wrong, neither can or ought to maintain an action against the other. The right of action does not depend upon which par-

The M. & W. R. R. Co. oc. Winn.

ty happens to suffer. If persons will sow to the wind, they must expect to reap the whirlwind.

But suppose, again, that neither one is culpable; and take this case as an illustration, as it is presented by the testimony on each side, most favorable to the respective parties: The train is approaching a crossing, at the ordinary speed; the whistle is sounded; the driver of the carriage hearing the signal, makes a momentary halt; it is seen by Mr. Snow, the engineer; he reasonably concludes that the intention is, to wait till he passes; and under that impression. he drives ahead without attempting to take up or check the train; the quicker the transit, the shorter the detention of the travellers. In the meantime, however, the negro, contrary to the orders of his mistress, determines that he can pass ahead of the train, and pushes forward accordingly. He gets on the track, but the mules, paralyzed by fear, or for some other cause, obstinately refuse to proceed, and the direful calamity detailed in the record is the consequence. If this be the case made by the proof—I do not say, nor even intimate that it is-ought a common and unforeseen misfortune like this subject the more fortunate party to a verdict for damages?

Our conclusion then is, that if both parties are equally at fault, or neither are guilty, there can be no action; and that the right to sue lies between these two hypotheses. The innocent sufferer is always entitled to redress, as a matter of course, taking the term *innocent* in its broadest meaning. He who is most negligent, can never ask a Court for compensation; he who is least so, may or may not, according to the facts and circumstances of the case.

How is a collision of this sort distinguishable, in principle, from those which happen daily in our towns and cities, and upon our great thoroughfares? Two gentlemen in buggies having the same right to the use of the street or highway, strive to take the best track from the other, and one or both of them are overturned. Would the party who was the greatest sufferer, consider himself entitled to redress? Sup-

The M. & W. R. R. Co. vs. Winn.

pose they were turning a sharp or rectangular corner, driving in opposite directions, and were upset, neither having the power to recede; would they not have to lie down under their misfortune? Such is the universal understanding of the country, as to the law of the road. And why should the case of a corporation be made to differ? Shall it be said that the steam-car, on account of its uncontrollable speed and power, requires super-added care in its management? The fact is admitted; but this very circumstance should induce greater caution and circumspection in those who approach them. This is the dictate of prudence.

Suppose the plaintiff in this case had stopped voluntarily on the road, and the disaster had happened; would it be contended, for a moment, that a right of action existed? If the driver, taking the chances, rushed there improvidently, and was unable to get off, why should the consequences be visited upon the other party? Had the result been different, and the train been thrown off, and the lives of many passengers lost, as was the case recently in New Jersey, from the wantonness of a fool-hardy doctor, how our sympathies would have been changed! And what a storm of indignation would have been poured upon the head of this reckless negro, whose temerity was, in all probability, produced by the bottle, which was found upon his person.

Courts must not permit themselves to be carried away by feeling in these cases, but endeavor to administer the law, firmly and fearlessly, in favor of, as well as against corporations. Our State is, unquestionably, mainly indebted to railroads, for the proud pre-eminence which she occupies in the Union. And the patriotic and public spirited men who built these roads, have sacrificed too much already to be made the victims of a blind and vindictive policy. Many of them have been made bankrupts, while the wise and prudent, who rail at their privileges and their profits, refuse to invest a copper, or to touch even with the tip of their finger, the stock in these "monopolies."

Tindall w. Harkinson and another.

No. 83.—HENRY W. TINDALL, plaintiff in error, vs. John. T. Harkinson and another, defendants in error.

[1.] A contract for the sale of land, will not be vitiated by a mere false assertion of the vendor, as to the quality and value thereof, where the buyer
has full opportunity of forming a correct judgment, and is not prevented
by the artifice of the seller from making the necessary examination; especially where the rescision is not applied for within a reasonable timeafter the injury is discovered.

In Equity, in Bibb Superior Court. Decision by Judge-Powers, November Term, 1855.

The bill in this case was filed by Henry W. Tindall, and alleged, that being desirous of purchasing some land, on which to employ a lot of negroes he held in trust for his children; he went to see a plantation in Taylor County, belonging to and cultivated by John T. Harkinson; that he informed Harkinson that he was utterly ignorant of the quality and value of lands, having no experience therein, and must rely on him for a truthful statement as to his lands: that Harkinson assured him he would do so; took complainant over a portion of the land, and assured him the remainder was equally good; stated that he made forty bales of cotton with eight hands that year (1853); that the land would yield from 8 to 1200 lbs. of cotton per acre, and from 15 to 25 bushels of corn; that land in that neighbohood sold, reads ily, for \$10 per acre, the price he asked for his; that it was a lively and thrifty soil, and well remunerative of the labor he put upon it; that complainant, relying upon these statements, and placing implicit confidence in Harkinson, purchased the land at \$10 per acre, took a deed therete, and gave his three several notes for the purchase money; uses which notes, he has since paid about \$900; that he took pessession of the land, hired a competent overseer, and has faithe fully tested it for two years; that he has discovered the statements of Harkinson to be utterly untrue; that the nonTindall vs. Harkinson and another.

tion of the land he did not show complainant, was the poorest and most inferior part of the tract; that he did not make the crop he said he did, but only one half of it; that land in that neighborhood never has sold for \$10, but that \$6 per acre is a full price therefor; that it will not yield the amount of cotton or corn which he stated, but that all of his representations were false, and made with the intention of deceiving and cheating complainant; that he has boasted that he sold his land for more than its value, and that he "stuck" complainant, who was a "greenhorn"; that in furtherance of hisfraudulent design, he has colluded with one Hiram B. Troutman, to whom he has transferred these notes, after the two first were due, and who received the same with full knowledge of the fraud; that Troutman has sued complainant on them; that he has reason to fear that Harkinson is insolvent. and cannot respond to any judgment he could recover for this The prayer was for an injunction.

The answer of Harkinson admitted the sale, but utterly denied every allegation of fraud; denied making the representations charged, or that complainant relied upon his statements; averred that he showed him all the land, and that a full month expired while he was negotiating for the land; denied that the transfer of the notes was colorable, but insisted it was bona fide; denied that he was insolvent or likely to become so.

The answer of Troutman denied, utterly, all knowledge of any fraud, or any difficulty, or dissatisfaction on the part of complainant, or that he received the notes otherwise than bona fide, and for value; that one only was due when he traded for them; that complainant had previously made a payment on the notes through him to Harkinson, without suggesting any difficulty about them.

Upon the coming in of these answers, the Court dissolved the injunction. This decision is assigned as error.

VOL XIX-57

Tindall vs. Harkinson and another.

LANIER & ANDERSON, for plaintiff in error.

TRACY, for defendant in error.

By the Court.—LUMPKIN, J. delivering the opinion.

[1.] The case made by the bill itself, is of doubtful sustainability. If men, under the circumstances set forth by the complainant himself, will not take the trouble to protect themselves, it is asking too much of the Courts to undertake this arduous duty.

Here is a purchaser who desires to make a considerable investment in real estate; he is on the premises, but did not examine the land; but alleges no satisfactory excuse why he He is not prevented by sickness nor want of time, but chooses to rely upon the representations of the vendor rather than upon his own eyes. I will not say judgment, for he admits that he lacked that. And that being so, any one of ordinary prudence would have consulted some disinterested person instead of confiding blindly in the owner. He is told that similar lands in the neighborhood are selling at ten dollars per acre; and yet, institutes no inquiry to ascertainwhether the fact be so. He puts faith in the seller's statements, as to the productiveness of the soil and the size of thecrops, when there were abundant sources at hand to appeal to He could have inquired of the children and on this head. negroes, the most, if not the only reliable witnesses in any region of country, both as to its health and fertility. But disregarding every means of ordinary precaution, Mr. Tindall makes the purchase blind-fold.

I never made but two trades in my life that I did not get cheated; and yet, I should have considered myself highly culpable, if I had not shown more diligence than Mr. Tindall, in guarding myself against imposition.

But if this be the case made by the bill itself, what equity is left in it by the answer? Nothing, we hold, upon which

Tindall vs. Harkinson and another.

to retain the injunction. Every material allegation upon which the equity of the bill depends, if, indeed, it has any equity, is met and flatly denied. To read the bill alone, we may conclude that the vendee got the worst of the bargain; but it is impossible to hear the answers and say he was defrauded. The undisputed facts in this case are against the defendant.

He bought the land in August, 1853, and took a deed to it. What season was more favorable to judge of the growing crop? He commenced making payments in February, 1854, shortly after the first note fell due, and continued to do so down to December, 1854, without uttering a word of complaint. He is sued to March Term, 1855, of the Inferior Court; and the offer to rescind the contract is not made until the filing of this bill, the August thereafter; and just about the time the notes would have gone into judgment, and exactly two years after he bought the property. It is said that figures cannot lie. As indicative of dates in this case, they speak significantly against the complainant. He renders no reason, either, for this unaccountable delay.

If the equity, as against Harkinson, is sworn off, there is an end of the case. But suppose it is not; the injunction could certainly only operate against the balance due upon the first note, that having been bought when past due. It must have been dissolved as to the rest. Indeed, it could only be retained as to a portion of the residue unpaid on the first note; for the complainant's reclamation amounts only to some \$1900; and Harkinson still holds one of the \$1600; so that, if there were equities between these parties, and Mr. Troutman could be affected by them, it could only be for the difference between the \$1600 still held by Harkinson, and the \$1900 claimed by Tindall. And to this extent, only, could the injunction be held up, under any circumstances.

But our judgment is, that the injunction should not be retained for any amount. Certain we are, that the Judge below was not guilty of flagrant injustice in dissolving the injunction. Ware pe. Jackson.

Mr. Tindall told Mr. Harkinson that he had been merchandizing all his life, and knew nothing about land; and I will add, he was necessarily ignorant of planting. And this possibly may be the reason why the place has not yielded according to expectation. A man or woman who knows nothing of any business which they attempt to carry on, are not likely to succeed through the agency of subordinates. the mistress knows nothing about cookery, the husband may make up his mind to eat bad victuals; if the merchant undertakes to farm through an overseer, he may look out for poor crops, however remunerative may be the soil. Guano will not save such an one from failure; and the more he gives the business his personal attention, as Mr. Tindall says he did, so much the worse. My experience and observation concur in satisfying me, that lawyers and merchants make excellent presidents of agricultural societies, but very indifferent practical planters. Physicians are more successful. others to account for it.

No. 84.—B. S. WARE, plaintiff in error, vs. L. JACKSON, defendant in error.

Claim, in Muscogee Superior Court. Tried before Judge WORRILL, December Term, 1855.

A fi. fa. in favor of B. S. Ware, against Willis P. Baker, was levied upon a lot of land, and Low Jackson interposed a claim thereto. The following were the facts: In January,

^[1.] A judgment is a lien on all the property of the defendant, from its date.

^[2.] If there is a good subsisting, legal title in the defendant at the time of the judgment, the property is bound.

1845, Baker sold the land to A. Iverson as trustee, and gave him a bond to make titles on the payment of the purchase money. On 10th November, 1846, Ware recovered his judgment against Baker. On 7th March, 1848, Baker made a deed to Iverson, having received the purchase money. Iverson afterwards, in June, 1848, sold to Jackson. Upon these facts the Court charged the Jury, that the land was not subject to the lien of Ware's judgment, after 7th March, 1848. This is the only question made in this case.

H. Holt, for plaintiff in error.

Downing, for defendant in error.

The Court not being unanimous, delivered their opinions seriatim.

By the Court.—McDonald, J. delivering the opinion.

The plaintiff offered in evidence an execution against the defendant, issued on a judgment obtained on the 10th day of March, 1846, which was levied on the tract of land, the subject of the claim, on the 22d day of June, 1848, which was read to the Jury. The plaintiff gave in evidence a deed also, made by William B. Kimbrough to the defendant in execution, dated the 27th day of December, 1843, for the said land, and also a deed dated 7th day of March, 1848, made by Willis P. Baker to Alfred Iverson, as trustee of Mrs. Mary Anne Holt. The plaintiff in execution proved, further, that the land had been levied on as the property of Baker; that Alfred Iverson had claimed it; that he withdrew the claim, and that the Court thereupon passed an order that the execution should proceed; that the land was worth twentyfive hundred dollars; that the defendant in execution went into possession of said tract of land, and remained in possession several years, and was succeeded in the possession by Dr. Likey Holt, the husband of Mrs. Mary Anne Holt.

The claimant then read in evidence, a bond given by defendant in execution to Alfred Iverson, trustee, for titles to said land, bearing date on the 1st day of January, 1845, the same deed by defendant to Iverson, read by plaintiff, and a deed made by Iverson to claimant for same land, dated 22d November, 1849. He then proved by Thadeus G. Holt, Jr. that under and for the said Iverson, as trustee, or for his father, Dr. Likey Holt, he went into possession of said lot of land early in the year 1845, and continued in such possession two years. He knew nothing of the payment of the purchase money to said Baker, or when it was paid, except that he, himself, handed him a part of it when he went into possession of said land, or while he was in possession of it.

The Court stated, in its charge to the Jury, many things that were conceded; and among them, that "Baker, on the 7th day of March, 1848, made a deed to Iverson to the lot of land, and Iverson then paid the purchase money." The whole of the charge of the Court is excepted to, but it is unnecessary, for the purposes of this case, to refer to the whole of it. In one part of it the Court holds this language: "But now, Iverson's equity is executed, and Baker has no title to the land; therefore, you cannot condemn the land under the execution, and you must find the issue for the claimant."

In this State, a judgment is a lien on all the property of the defendant. (Cobb's New Dig. 494, 496, 497.) It is a legal lien, and binds the legal title, as it is the highest evidence of property. The burden of proof, on the trial of claim cases, is on the plaintiff, when the defendant is not in possession of the property. The bare possession of the property by the defendant, is evidence of his ownership; and the claimant is bound, when that is shown, without any proof of title in him by plaintiff, to make good his title.

If the defendant is not in possession of the property, the plaintiff must then prove title in him. (Cobb's New Dig. 533.) This he can do in no more effectual manner than by producing a deed conveying the legal title to him. In this case, the plaintiff went further, and proved possession of the

land by the defendant, and a conveyance by him of the land to the first trustee. This conveyance was after the judgment lien had attached to the land.

The claimant relied on the last named deed as his evidence. to prove that the title had passed out of the defendant in execution to his predecessor in the trust; and he gave in evidence a bond executed by the defendant in execution to Iverson, the first trustee, dated the first day of January, 1845. before the judgment, binding himself to make a title to the land on the payment of a note given by him to defendant, of six hundred dollars, of the same date of the bond, and payable-12 months after its date. It was conceded that the money was paid at the time that Baker conveyed to Iverson (on 7th March, 1848). This, with the conveyance from Iverson to claimant, constituted his title. The claimant had no title to the land, at the time the creditor's judgment lien attached to the land, and it was then subject to seizure and sale by the Sheriff. Did the subsequent payment of the money and the taking of a conveyance, defeat the lien of the judgment? What is a lien? It is an obligation, title or claim annexed to or attaching upon any property, without satisfying which, such property cannot be demanded by its owner. (Tomlin's Law Dic. Title "Lien.") If the lien attached upon the land, the owner, whether it were Baker or Iverson, could not have the property until the lien was satisfied. It was insisted in the argument, that Baker, having contracted away the land and delivered possession of it, and given a bond to make a title when the purchase money was paid, placed Iverson in the condition of a mortgagor, and Baker in that of mortgagee; and that the interest of a mortgagor in land, is not the subject of levy and sale; and therefore, the land could not be seized and sold as Baker's land.

This argument changes the position of the parties in order to apply a principle to the case, that does not apply to it as the facts exist. It supposes, in the face of facts to the contrary, that Baker, at the time of the sale, parted with the property and took a re-conveyance of it as security for the

payment of the purchase money; when, in truth, he chose toretain the property and the title, which was a much better security to him, treating it as a security, than a mortgage could be. In the case of a mortgage, the mortgagee would have the right of redemption until that right became barred by the Statute of Limitations; and the non-payment of the purchase money, when due, did not affect the right of redemp-It is very different under a special contract for a title, for in that case, the purchaser, on the breach of his contract to pay, lost his right to demand a title to the property, and could not enforce it in Equity, unless the vendor had waived his right to take advantage of the purchaser's breach of his It is unnecessary to go into the consideration of what would be the effect of the transfer of Iverson's note by For my own part, viewing the case as I do, it is not material to the rights of the judgment creditor, whose legal lien attached upon the property, what difficulties Baker's conduct may have thrown in the way of Iverson, so long as the creditor had no connection with it. In this case, there was a good, subsisting legal title to the land in Baker, at the time of the judgment; the property was his; he had not parted with it, and did not intend to part with it, until he was paid; and so it must have been understood by the purchaser; the property was bound by the judgment, under the Statute; and the subsequent execution of the contract, and the conveyance of the land, no more affects the right of the judgment creditor than if the entire contract of sale, payment and conveyance had been made by the parties after judgment, without the purchaser's notice of the judgment. The Court, therefore, erred in the charge given to the Jury. as hereinbefore set forth.

Iverson, it seems, made default in the payment of the note. It was due on the first of January, 1846, and was not paid until more than two years afterward; and in the meantime, the judgment was obtained. He had no equity, by reason of the default, and he lost all right to a specific performance of

the contract, if Baker had insisted on it. (Bogart vs. Perry, (1 Johns. Ch. R. 55.)

No arrangement between Iverson and Baker, after judgment, could defeat oreditor's lien.

Judgment reversed.

LUMPKIN, J. concurring.

While I concur in a judgment of reversal, I must say that it is not without some doubt and misgiving. The simple view which I take of the case is this: After the contract of sale by Baker to Iverson, Baker held the legal title to the land as security for the balance of the purchase money. The judgment, at the instance of Ware against Baker, bound the legal estate of Baker in the land, which was not parted with at the time of the rendition of the judgment. The Sheriff's. vendee would stand precisely in the situation of Baker; and therefore, it was incumbent on Iverson, as it is of every purchaser from a judgment debtor, to search the office before payment of his money in 1848, and see whether, in the meantime, no lien against Baker had attached upon the land: because, in that event, Baker could not consummate the contract nor Iverson acquire an indefeasible title. bought in 1845, paid \$500, gave his note for \$600, and took a bond for titles. In 1846, Ware obtained judgment against Suppose Baker, after that, had sued Iverson for the \$600—might not Iverson have prevented a recovery by pleading this outstanding incumbrance? If so, it is clear that Iverson could not, by making voluntary payment of his note, defeat the judgment lien of Ware. Had the note been trans-

Ware or. Jackson.

ferred by Baker for a valuable consideration, to a bona fideholder, the case would have been different.

I stated in Wilkinson vs. Burr, (10 Ga. R. 117,) that a purchaser under a judgment against either vendor or vendee, like a purchaser from either by voluntary conveyance, succeeded only to the interest which the debtor had to incumber or part with, and no more nor no less. The purchaser in the one case, whether at private or public sale, being entitled to call for the balance of the purchase money, as the representative of the vendor, and the other being entitled to call for a conveyance, as the representative of the vendee, upon paying up what was due; that it was not land, but the debtor's interest in it, whether he be vender or vendee, that is sold, leaving the residue untouched. I see no reason to change that opinion—that the purchaser's interest as well as the seller's, will be bound by a judgment. See Dart's Vendors and Purchasers of Real Estate, 115 and 119.

It is argued that this case is precisely the same as though Baker, in 1845, had executed a deed to Iverson and taken a mortgage from his grantee to secure the payment of the purchase money. And it is analogised to the case of Jackson ex dem. Norton & Burt, against Willard, (4 Johns. R. 41,) where it was held, that lands mortgaged cannot be sold on an execution against the mortgagee, before a foreclosure of the equity of redemption, though the debt be due, and the estate of the mortgagee has become absolute at law.

I leave this and all the other intricate questions involved in this record, to be discussed at length by my ally and our dissenting brother, both of whom, I am sure, are fully prepared for the work. One conclusion is fairly deducible from this argument, and especially from the New York case just cited, namely: that the position taken by this Court, at an early day after its organization, that a mortgage is not an estate in fee, but a mere security for a debt, is abundantly sustained, both upon reason and English, as well as American authority.

Benning, J dissenting.

Before the rendition of the judgment, in this case, Baker, the defendant in the judgment, had sold the land, given his bond to make title on payment of the purchase money, delivered up possession of the land and received the greater part of the purchase money. The contract of sale had not been at all rescinded, nor did there exist any reason to authorize either party to ask for a rescision. A part of the purchase money, it is true, remained unpaid; but it does not appear, even that that part had then fallen due.

Was this land subject to the judgment against Baker? That is the question.

What interest did Baker retain in the land? The legal title to it. Why? To serve as security for the payment of the purchase money, and for no other purpose. He retained no right to sell the land to another person; no right to recover possession of it himself; no right to encumber it in any way.

True, that if, although he retained no right to sell it, he had, without right, sold it; and sold it to a person not having notice of the previous sale, that person would have got a good title. But this would have been so, by virtue of certain principles of equity.

This, then, is the quantity of interest which Baker retained in the land—the legal title as a security for the purchase money.

And this is the interest which a trustee has in the trust property. Baker, the vendor, became, for the vendee, a a trustee of the land.

"One of the first principles of equity is, that it looks upon things agreed to be done, as actually performed; and acting on this principle, when the contract is made, it considers the vendor as a trustee for the purchaser of the estate sold, and the purchaser, as a trustee of the purchase money for the vendee."

"This equity attaches immediately on the making of the contract; and will not, therefore, be affected by the subsequent death, or bankruptcy, or any other act of either of the parties, before the contract is carried into execution." (Hill on Trustees, 171; See 1 Sug. Ven. & Pur. 273; 2 Stor. Eq. §§789, 790.)

"The legal inheritance vested in trustees, is not, in Equity, subject to the dower or free bench of their widows, or to the estate by courtesy of their husbands, although those rights will attach on the trustees' estate at Law. Nor will that or any other interest, held only in trust, be affected, in Equity, by the judgment or other debts or engagements, or by the bank-ruptcy or insolvency of the trustee." (Hill on Trustees, 269.)

Assets in the hands of an executor or administrator, are not, even at Law, subject to a judgment which is against him individually; yet, he individually has the legal title to them. (1 Wms. on Ex'rs, 402.)

So mortgaged property, before a foreclosure of the mortgage, is not subject to a judgment against the mortgagee. Excellent reasons are assigned for this in Jackson vs. Willard, (4 Johns. R. 41.)

And all those reasons exist in a case like the present; a case which, indeed, differs from that of a sale with a mortgage back of the property sold to secure the price, only in form. (Cobb's Dig. 517, 518, 519.)

In each of the two cases, the seller holds the legal title, and holds it for the same purpose—to secure the payment of the purchase money. In each, he may subject the property to the payment of a judgment for his debt, to the exclusion of all other judgments.

The Act of the Legislature declares, that "When any judgment has been or shall be rendered in any of the Courts of this State, upon any note or other evidence of debt, given for the purchase of land, where titles have not been made, butbond for titles given, it shall and may be lawful for the chilgor in said bond, to make and file, and have recorded in the

Clerk's office of the Superior Court of the county, a good and sufficient deed of conveyance to the defendant, for said land; and thereupon, the same may be levied on and sold under said judgment, as in other cases: *Provided*, that the said judgment shall take lien upon the land prior to any other judgment or incumbrance against the defendant." (*Cobb's Dig.* 517, 518.)

This object might, no doubt, have been accomplished in Equity, before the passage of this Act.

A judgment of foreclosure of a mortgage, has a like effect in respect to the property mortgaged.

If, then, the title which a mortgagee has, is not subject to a judgment against him, neither can the title which a vendor retains as a security for the purchase money, be subject to a judgment against him.

And why should not this be so? The legal title, as a security for the debt, is but an incident of which the debt is the principal; and it is a maxim, that accessorium non ducit, sed sequitur principale. The security—the land—therefore, cannot be separated from the debt. And if sold, it would be separated from the debt. It could not carry the debt with it, not only because of the maxim aforesaid, but for another reason. To let it carry the debt with it, would be the same as subjecting the debt, itself, to levy and sale; and a debt is not the subject of levy and sale. McGhee vs. Cherry, (6 Ga. 550.) Indeed, the debt may have been negotiated.

Now when the debt has been negotiated by the vendor, all admit, I believe, that the legal title is not subject to a judgment afterwards obtained against him; but, in principle, what difference can it make whether the debt has been negotiated or not, if it be true that the judgment has no lien on the debt; for if it has none, then the vendor must have the right to negotiate it. If the judgment has no lien on the debt, it has nothing whatever on it or in it; and if this be so, the judgment cannot be the instrument of transferring the debt from one man's hands to another's.

The result of all that has been said is, I think, the conclu-

sion, that the interest which Baker, the vendor, retained in this land, was not, at least in Equity, subject to this judgment.

But if the claimant might accomplish the object of his claim by a bill in Equity, I do not see why he may not do the same thing by his claim at Law. The Act of 1820 declares, that "Whenever a plaintiff or complainant shall conceive that he, she or they can establish his, her or their claim, without resorting to the conscience of the defendant, it shall and may be lawful for every such plaintiff or complainant to institute his, her or their action, upon the Common Law side of the Court; and shall not be held to proceed with the forms of equity." (Pr. Dig. 447.)

I am not sure that I understand on what ground the judgment of the majority of the Court is put. I am not certain as to the *quantity* of interest in this land which they think subject to the judgment.

I suppose, however, that as to this, I may assume that one of two things is true—

- 1. Either that they deem the whole interest in the land subject;
- 2. Or, that they deem that only such a part of the interest as shall be equal, in value, to the amount of the unpaid part of the purchase money is subject.

New if what I have already said is true, neither of these propositions can be true.

There is, however, another reason why I think they are not true—a reason founded on the rights of the vendee, in cases of this sort.

At the time when the contract of sale is made, in cases like the present, the contract is a good contract, and instantly confers rights on the parties to it: on the vendor a right to have the purchase money the moment it falls due; and if it is not then paid, a right to take steps to subject the land to its payment; on the vendee, a right to have a title made to him the moment he pays the purchase. Yes, it is the right of the vendee derived from the contract, that he shall have a

itle to the land, conveying to him the whole interest in the land, on his payment of the purchase money.

But if we let the whole interest in the land be sold to satisfy a debt against the vendor, we defeat all the right which the vendee derived from his contract. We put it out of the power of the vendor ever to make him a title to any interest in the land.

If we let a part of the interest in the land be sold—an interest, say equivalent in value to the unpaid part of the purchase money, we do the same thing only in a less degree.

It is therefore impossible, it seems to me, to let any quantity of interest in the land be sold to satisfy a debt of the vendor's, without violating the lawfully acquired rights of an innocent person, the vendee.

It will not do to say that what is allowed to be sold, is not an interest in the land, but a mere right to have payment of the purchase money. A debt is not subject to be sold under fi. fa. I have, however, already discussed this point.

In conclusion, I will simply say that I see nothing hard to creditors, in the result to which I have come. They may, by a garnishment, get their hold on the debt for the purchase money, and by an injunction, secure that hold; and with this they should be content; for the right to the purchase money is all that the vendor, their debtor, is in justice and equity entitled to; and they cannot be entitled to more than he is. And the best way by which they can get at this, I think, is the direct way—the way of garnishment.

For these reasons, I dissent from the judgment of the Court.

Thornton vs. Adkins.

No. 85.—Dozier Thornton, plaintiff in error, vs. Solomon Adkins, defendant.

- [1.] The Act of 1847, to authorize parties to compel discoveries at Common.

 Law, requires of the Court or Judge, in vacation, to whom the application is made, before granting the order requiring the interrogatories to be asswered, to be satisfied, from the oath of the party or otherwise, of three things—1. That the testimony is material; 2. Pertinent; and 3. Such as the plaintiff or defendant would be compelled to disclose in answer to a bill for discovery, filed in Chancery by his adversary.
- [2.] If an order, requiring interrogatories to be answered under the Act of :1847, has been improvidently granted, the party has the right to refuse to answer until he can be heard; and thus protect himself from being forced to make discovery which would subject him to a penalty or forfeiture, or have a tendency thereto, to criminate himself, involve him in a breach of professional confidence as Counsel, or that is immaterial to the case.

Debt, &c. in Muscogee Superior Court. Decision by Judge WORRILL, December Term, 1855.

In this case, certain interrogatories had been propounded to the plaintiff, under the Statute. The order of the Judge was issued upon the affidavit of the defendant, that the plaintiff's answers would be material evidence for the defendant.

The order recited, that by inspection, the Court perceived that they were pertinent and such as the plaintiff would be bound to answer upon a bill filed in Chancery. Upon the trial, plaintiff demurred and objected to answering, on the ground that the granting of the order was not authorized under the Statute. The Court sustained the objection, and this decision is assigned as error.

- H. HOLT, for plaintiff in error.
- W. Dougherty, for defendant in error.

By the Court.—LUMPKIN, J. delivering the opinion.

[1.] We propose to limit our decision to the only question.

Thornton es. Adkins.

which we think made by the bill of exceptions: and that is, whether the order of the Judge requiring the interrogatories to be answered, was authorized by the Act of 1847?

The first section of that Act provides, that "any party. plaintiff or defendant, in any action at Common Law, pending in any Superior or Inferior Court of this State, wishing a discovery from the adverse party, to be used in evidence at the trial of such action, may file written interrogatories to such party, and call upon him to answer the same in solemn form, on oath or affirmation; and if, upon such interrogatories being filed, it shall appear to the Court, by the oath of the party filing the same or otherwise, that answers to such interrogatories will be material evidence in the cause, and that the interrogatories themselves are pertinent, and such as the adverse party would be bound to answer upon a bill of discovery in a Court of Chancery, the Court shall allow such interrogatories, and shall make an order requiring the adverse party to answer the same, in writing and in solemn form, on. his oath or affirmation." (Cobb, 465.)

The order of the Judge in this case, requiring the interrogatories to be answered, was founded upon the "affidavit of the defendant, that the answers would be material evidence in the cause, and upon an examination of the questions themselves." The order states that the Court perceived, by inspection, that the interrogatories were pertinent, and such as the party would be bound to answer upon a bill filed in Chancery.

That the questions are pertinent to the pleas, is not denied. Whether the pleas, themselves, are allowable, involves legal principles of the gravest consideration; and which this Court will not undertake to decide, until they are fully discussed. We have uniformly given to this Act and those amendatory thereof, the most liberal construction; and we see no reason to depart from that policy. It is a highly beneficial law, and should never be used for improper purposes.

We agree that it should appear in some way, to the Court

Thornton vs. Adkins.

or to the Judge, in vacation, who grants the order, that the interrogatories are material, and that the disclosures sought are such as the party would be compelled to make to a bill filed for discovery; still, all that the Statute requires is, that the Judge should, from the oath of the applicant, on inspection of the interrogatories, and his knowledge of the case "or otherwise," be satisfied that the commission should issue.

"The first rule respecting discovery," says Mr. Adams. in this work on Equity, (pp. 105-'6,) "is, that the defendant must answer to all facts material to the plaintiff's case. is not bound to answer questions of law; for such questions ought to be decided by the Court. He is not bound to answer questions of fact, unless reasonably material; for he is not to be harrassed with idle, and perhaps mischievous, inquiries. And it will not be sufficient to show, that somehow or other they may be connected with the case; for if such connection be very remote, so that the discovery would be oppressive, it will be refused; as, for example, where a bill charged an executor with mixing his testator's money with his own, and called on him to set out a monthly account of his banker's balances, with an account of his own property, debts and liabilities. And lastly, he is not bound to answer merely because the question is material to the issue, but it must be also material to the plaintiff's case."

[2.] If the interrogatories propounded, therefore, are obnoxious to any of the foregoing objections, or are fishing or impertinent, or would make the defendant liable to a penalty or forfeiture, or have a tendency thereto; or would compel him to criminate himself; or would involve him in a breach of professional confidence as Counsel, or the discovery would be immaterial, it would be improper to allow the interrogatories to be filed; and if leave be improvidently granted, the party would be justifiable in refusing to depose until he could be heard. Every citizen is, and of right ought to be, entitled to be heard before he can be stripped of the shield which the law has thrown around him, and be subjected to an inquisition not authorized by the case. A bill for discovery, con-

Thornton ps. Adkins.

taining objectionable matter, is demurrable; and if personally examined on the stand, as a party now, by law, may be, the same as any other witness, he could object ore tenus to the questions put to him. The case of interrogatories was not intended to constitute an exception to all the analogies of the law, in this respect, and should not be so held.

As to the form of the application, then, we deem it but of little importance. Here the language of the law has been literally pursued; and we are not prepared to say that the order was illegally granted. We do say, however, that if the interrogatories, or any of them, are such as a Court of Equity would not compel a defendant to answer to a bill of discovery, they are excluded by the very terms of the Act. And for myself, I am clear that any party against whom such interrogatories are sued out, should be permitted to controvert the propriety of the questions asked before he is forced to answer them. If, upon the refusal of the party to answer, the Circuit Court should be of the opinion that such refusal was captious or intended for delay, it is invested with plenary power to pass such order as will do justice in the If, on the other hand, it finds that the original ex parte order was improvidently granted, it should not hesitate The party must have his day in Court, in to set it aside. relation to this as well as to every other right; he cannot be .condemned unheard, or what is worse, hung and then heard.

Shaw vs. M. & C. Macon.

No. 86.—HARVEY W. SHAW, plaintiff in error, vs. THE MAYOR AND COUNCIL OF MACON, defendants in error.

- [1.] The Mayor and Council of Macon have discretionary power, within the restrictions of the Act of incorporation, to remove the marshal from office. The causes for which he may be removed, are specified in the Act, and the power of removal cannot be exercised but for the specified causes.
- [2.] They cannot escape the consequences of removing the marshal, by assuming to act in a judicial capacity in investigating the causes of removal.
- [3.] The persons composing the Mayor and Council of Macon, who removed the marshal from office, not being sued individually for a tortious or wrongful act, arising from error of judgment as judicial officers, the question of their personal liability for such act, cannot arise in this case.
- [4.] The defendants are sued on the original contract with the marshal, for the whole of his year's salary and perquisites; and whether the defendants were justified in removing him, is a matter of defence.
- [5.] The marshal cannot recover of defendants money expended by him in defending himself against the charges preferred against him.
- [6.] His damages are such, if he is entitled to recover, as necessarily resulted from his amotion from office.

Action, in Bibb Superior Court. Tried before Judge Powers.

The decision of the Court gives a sufficient statement of the facts.

LANIER & ANDERSON, for plaintiff in error.

Por, for defendants in error.

By the Court.—McDonald, J. delivering the opinion.

The plaintiff instituted his suit in the Court below, for the purpose of recovering from the defendants the amount of salary that would have accrued to him as marshal of the City of Macon, for the time intervening his removal and the expiration of the term for which he was elected; and also, the permissites of his office of marshal during the same time; and

Shaw vs. M. & C. Macon.

for recovering, also, the expenses of defending himself against the charges for which he was removed from office.

- [1.] It is unnecessary to consider the point made in the argument, whether the defendants can be held liable, as judicial officers, for errors of judgment. The marshal is elected by the people, but he is under the exclusive control of the mayor and council, and may be dismissed from office, at any time, for malpractice in office or neglect of duty, by a vote of a majority of the members present. (Acts of 1852, p. 389.) The mayor and council have discretionary power to remove him within the restrictions of the Act. They cannot remove him but for the specified causes.
- [2.] And in investigating these causes, they cannot organize themselves into a Court, and by assuming to act in a judicial capacity, escape the consequences of the amotion of their officer, without sufficient legal cause. Again—they are not sued as individuals; the suit is against the corporation.

The Court below, however, held that the defendants, in amoving plaintiff from office, acted as a judicial body, and are not responsible for their errors of judgment while sitting and acting as a Court.

- [3.] As remarked, it is unnecessary to discuss the proposition, whether the persons constituting the Mayor and Council of the City of Macon, are amenable as individuals for errors committed by them as judicial officers. That is not the complaint in this case. The suit is against the corporate body. The names of the individuals who formed the corporate body which amoved the defendant, are not mentioned, either in the declaration or process.
- [4.] The action is not for damages for a wrongful or tortious act, but is on the original contract, and is the ordinary case of a party's suing and claiming the full benefit of a contract which he has not performed, but the performance of which was prevented by the act of the other party. The defendant may, as in all such cases, plead to the action and justify the dismissal of the plaintiff, if the facts warrant the defence. The defendants, however, cannot be allowed the

Shaw vs. M. & C. Macon.

same latitude of defence as natural persons. They are a body corporate, and have no powers except such as the incorporating Act confers, and such as are incident to the same kind of corporate body. The corporation has no incidental power of removing an officer, deriving and holding his appointment as plaintiff did. Its whole power, in this case, is derived from the charter; and by the charter it could not remove him, except for malpractice in office or neglect of The record, embracing a former report of a case between the same parties, shows that specific charges were made against the plaintiff, which, it was alleged, amounted to malpractice in office and neglect of duty; and on these charges This Court held that the said charges did he was removed. not amount to malpractice in office or neglect of duty by the marshal; and, of course, the removal thereon was illegal. We think the Court erred in awarding a non-suit; and on that ground, the judgment must be reversed.

- [5.] The plaintiff cannot recover of defendants, money expended in Counsel fees, in defending him against the charges preferred against him. (5 Wendell's Rep. 533.)
- [6.] His damages are such as necessarily resulted from his amotion from office, viz: his salary and perquisites, should the Jury, under the law as it may be given them in charge by the Court, believe that he is entitled to the full benefit of his contract, leaving open to the defendants, however, all the defences they may legally have under their restricted discretionary power under the charter.

Semmes w. M. & C. Columbus.

- No. 87.—SEMMES and others, plaintiffs in error, vs. THE MAYOR & COUNCIL OF COLUMBUS, defendants in error.
- [1.] Defendants to a bill in Equity, may be called out of the county of their residence, and out of the county in which the suit is pending, to argue a motion to dissolve an injunction.
- [2.] Injunctions granted on the ex parte showing of the applicant, are, under the 4th rule of Equity practice, granted on terms.
- [3.] If there are more defendants than one to a bill praying an injunction, and the defendant or defendants against whom the equity is claimed by complainants, answer fully and deny the equity, the injunction may be dissolved without the answer of the other defendants.
- [4.] When a bill praying an injunction is amended, the Court may hear and decide a motion to dissolve the injunction before the bill, as amended, is answered.
- [5.] The Acts of 1845 and 1853, amending the charter of the City of Columbus, have no reference to cases where the money or credit of the city has been committed to any matter or thing, nor do they control or prescribe the manner in which the broad discretionary powers of the corporation shall be used in applying its assets to the payment of its debts.
- [6.] The Mayor and Council of Columbus, if trustees, do not belong to that class of trustees against whom there is a remedy in a Court of Equity only; and therefore, the injunction will not be sustained against them on that ground.
- [7.] But if they belonged to that class of trustees, being invested with discretionary powers in the matter complained of, a Court of Equity will not interfere with that discretion, when exercised bona fide.
- [8.] A body corporate is not answerable for an erroneous exercise of a discretion, though its consequences be injurious.
- [9.] Inadequacy of price, unless so great as, of itself, to be evidence of fraud, is not a sufficient ground for impeaching the contract.
- [10.] It does not appear from the bill, that any certain advantage will accrue to either the complainants or citizens of Columbus, by sustaining the injunction; and the Court will not continue it unless some beneficial object can be accomplished by it.
- [11.] It is a matter of sound legal discretion in the Court, to hold up the injunction or not.

In Equity, in Muscogee Superior Court. Decision by Judge WORRILL, at Chambers.

Semmes vs. M. & C. Columbus.

The plaintiffs in error, on the 24th day of November, 1855, presented their bill in Chancery, praying an injunction against the defendants in error, which was, on that day sanctioned, at Chambers, by Judge WORRILL, Judge of the Superior Courts of the Chattahoochee Circuit. The allegations in the bill are substantially, as follows: That complainants are property holders, and most of them citizens of Columbus; that the City of Columbus, in the year 184-, subscribed for stock in the Muscogee Rail Road, and issued city bonds for it, and owns 1800 shares and upwards. In April, 1855, a resolution was passed by the mayor and council, for the saleof stock, to raise funds to pay first instalment of city's subacription for the stock, provided it could be sold at a fair price, to be judged of by finance committee; and if said stock could not be sold for a fair price, then said council intended to provide other means to raise funds to pay said instalment: that Wiley Williams, mayor of the city, without authority and without consultation with the committee on finance. entered into a contract with Richard Patton and John L. Mustian, to sell to them 1800 shares of the said stock, being nearly all owned by the city, for the sum of One Hundred and Fifty-One Thousand Dollars; Twenty-Six Thousand Dollars to be paid by the first day of January after the filing of the bill, and for the balance, \$125.000, the purchasers were to pay the city bonds as they became due. This contract to sell, it is alleged, was made without informing the committee on finance, and without a resolution of council authorizing it: that the city council had to pay \$25.000 only, as the instalment agreed to in the resolution; and to that extent only. was the mayor authorized to make sale of stock at a fair price, to be judged of by the finance committee; and there was no authority given, either to the mayor alone or to the mayor and finance committee, by any resolution of the council, to sell all, or nearly all, of the stock belonging to said city, or any more than was sufficient to pay the said instalment, amounting to about the said sum of \$25.000; that the

Semmes es. M. & C. Columbus.

said sale was made privately, without public notice that the stock would be sold on a credit, and inviting bidders to make offers for the same; and that said sale was made at a price below the value of the stock, and less than would have been given for it if an opportunity had been given to others to offer for it, and less than other persons are now willing to give for it on the same terms; that said Wiley Williams, the mayor, made the contract without convening the committee on finance and submitting the matter to them, and without consulting them privately and separately, or even letting them know anything about it, until after he had made the contract on his own mere motion; and that they first heard of it as a matter of news and public talk; and that John J. McKendree, William A. Bedell and Henry T. Hall never had an opportunity, as a finance committee, to approve or reiect said offer, until after the same had been signed by the said Williams as mayor, and the said Patton & Mustian; and not even then as a committee, but only as members of council, when the same was laid before said city council; that said contract was made on Saturday, and was, by Williams as mayor, and not by the finance committee, reported to council on Monday, and a majority of the council refused to postpone any action on it until the next ensuing meeting, although exertions were made to induce them to postpone it. and added Williams, the mayor, to the committee, and directed the committee to consummate the contract; that the finance committee have not yet consummated the contract. although the said Williams was urgent for them to do it: and although some of the members of said committee had been informed that other persons were ready and willing to give a larger price for said stock, and were willing to wait until the next meeting of the council; that the customary opportunity of re-considering the proceedings in relation to the sale of said stock, may be afforded, and which is the established rule in the proceedings of said council; that the said Patton & Mustian, their associates and friends, are anxious to hurry the

TOL. XIX-60

Semmes se. M. & C. Columbus.

matter to a conclusion, because they confidently believe, if they do not know, that an inadequate price has been given for said stock, and that a larger price could readily be obtained; that a consummation of said sale would operate a great fraud upon the people and property holders of Columbus, to whom the said stock belongs. These are substantially the allegations in the bill. The bill prays for a subpæna, an injunction and general relief.

The city council answered the bill, admitting the subscription for stock in the Muscogee Rail Road, for the sum of \$150.000, and the giving of bonds of the city for said amount, payable in annual instalments of \$28.000 each, and setting forth the circumstances which led to the subscription. were negotiated by the city council for the purpose aforesaid, and are now in the hands of bona fide holders unpaid. answer further states, that for these bonds and the interest paid on them by the city, the rail road company has issued to it stock to the amount of \$180.000. The first instalment of \$25,000 of the bonds, fell due 1st July, 1855. to provide for the payment of that instalment, it having been the general understanding, at the time of subscription, that the stock was to redeem and pay the bonds, the city council passed a resolution authorizing a sale of part of the stock. The only alternatives to raise the means of paying this instalment, was to borrow the money, tax the city or sell the stock, and the last the wisest resort. Not being able to sell enough of the stock at 80 cents in the dollar to pay the instalment: due, the council was compelled to borrow \$30.000 on a pledge of stock and at a high interest, for ninety days; and when that debt was about to mature, they were compelled to resort to another loan on a still heavier pledge of stock in the road, and which the answer alleges would be at the disposal of the lenders, unless payment is made or an extension The city council, for reasons stated in the answer, during the passed summer, informally, without a resolution, agreed to sell the stock, for the purpose of relieving the city from her liability on the bonds; and in pursuance

Semmes ev. M. & C. Columbus.

thereof, an effort was made to sell it in Charleston for \$150,-000, the interest to be paid, and instalments, as they became due. The stock could not be sold in Charleston or elsewhere, on the terms stated, and it was then offered by the mayor to the defendants, Patton and Mustian, who agreed to take it on terms specified in exhibit (B) annexed to the complainant's bill. On the Monday night afterwards, at a regular meeting of council, reported what he had done, a copy of the report annexed to answer as exhibit (A).

The answer of the city council proceeds, further, to state that the action of the mayor was not without authority or in violation of his duty in the premises; that he was not acting under the resolution of April, but under the said informal understanding, and that he did not pretend, without the concurrence of council, to sell the stock, and that it was understood by the parties, that the council were to ratify the act; that the said Williams made no contract by which the stock of the city was sold; but on the contrary, he received and reported proposals for its sale; that the city council made, ratified and confirmed it; that it was their act and deed, and that the ratification was known to complainant, Paul J. Semmes, before the filing of the bill; that said stock was not sold below its value; that they could get no more for it from responsible parties: the council had tested the market, and the price at which it was sold to Patton and Mustian, was more than that offered by any one else; that complainants made no offer for it until after it was sold, though some of them knew that a part or all of it was for sale; that they made no offer before council had ratified the sale to Patton & Mustian, although they knew the terms on which it was to be sold to them; that individual stockholders had sold for less, and others had offered at 85 cents, and could not get it; that the stock was not sold at an inadequate price, but at the market value; that council submits, that if more had been offered by irresponsible parties, or by parties wanting in promptness or disposed to litigate, the interest of the city would have required a discrimination in favor of promptitude

Semmes ov. M. & C. Columbus.

and responsibility; that defendant is not prepared to declare what other parties might now be disposed to offer, but they believe that they would not offer such an advance as would authorize the repudiation of a contract fairly made, and after notice to some of the complaining parties; that there was no fraud in the sale, and that said sale will not operate as a fraud upon the city, but will be of great benefit to it and the citizens, and sets forth reasons; that they neither published the stock for sale in the newspapers, nor put it up at auction; that a prudent stockholder would never think of enhancing its value in the market by making known the necessity of a sale, nor would he put it up at auction without a minimum price to prevent combinations; that such a course would have deteriorated the price of the stock; and that if it had been pursued, no such price would have been obtained for it; that complainants live in the city, or have property therein, subject to taxation; but the council is of opinion that they would prefer to make something out of the stock rather than to pay taxes; that Patton & Mustian reside in the city, or have a large property therein, and the council presumes they expect to make something by their contract; but the council feel assured that they have made a good trade for the city; that they were bound to look after the interest of the city; and in doing what they have done, they consulted that and that alone.

The defendants, Patton & Mustian, answered the bill, and admit that the stock was offered to them at the time stated by the mayor, Williams, with whom they agreed on terms, to be submitted to the council for ratification, which was reported by the mayor to the council on the Monday night afterwards, and was by them ratified and confirmed. They deny that the contract was made with them in private or clandestinely, or with any intent on their part to commit a fraud.

They answer, that the contract was made by them fairly and honestly, for a fair market price and for an adequate consideration, and they are of the opinion and belief that it will be of an advantage to the city, and will not operate as a

Semmes vs. M. & C. Columbus.

fraud; but they would not have made the purchase if they had not believed they could have made something by it; they may realize a profit, but they had to take upon themselves the hazards of the enterprise; they feel, however, that they made as liberal a contract with the city as could have been made at the time; they tendered the security required under the contract, which was considered by members of council ample and sufficient, and have been at all times, and now are ready and willing to comply, in all things, with their part of the agreement: that they desired the council to act in this matter with their usual and reasonable dispatch, but they assert that they did not attempt to hurry the contract to a consummation for any unfair purpose, or for the purpose of gaining any unfair advantage; and that no unusual haste or hurry was practised by said council, in acting on said agreement; they have read the answer of defendant, Williams, and adopt it, except so far as it is qualified by their answer.

The defendant, Williams, answers that complainants are citizens of Columbus, or its vicinity, and own property therein; but denies that they have any interest, whatever, in the stock owned by the corporation of the city in the Muscogee Rail Road, or that their persons or property are in any way liable to be taxed for the payment of the principal due or to become due, on the bonds issued by the city, for the purchase of the stock; that the corporation own said stock in their own right, and not as trustees or agents for complainants; that they can, in no event, claim any right or interest in the stock; that the mayor and council of the City of Columbus, have a perfect right to sell said stock, and apply the proceeds thereof to the payment of the debt contracted by its purchase; and defendant, therefore, demurs to the said bill, and prays that it may be dismissed.

The defendant further answering, says, that the mayor and council of the City of Columbus, about the year 1850, in their corporate capacity, subscribed for 1500 shares in the said rail road, and issued bonds in payment to the company, in the sum of \$150.000; that the bonds bear interest, payable

Semmes os. M. & C. Columbus.

semi-annually, on the 1st of January and July of each year: that the first instalment of \$25.000 becomes due on the 1st of July, 1855; and other instalments of like amount become due annually, at the same time, until all shall be paid; that interest was allowed on said stock up to the time the road went into operation and declared dividends; and by the accrual of this interest and the payment of it in stock, the stock was increased to over 1800 shares. The answer, then. proceeds substantially, (but with rather more particularity,) as the answer of the mayor and council, to detail the efforts to sell the stock, their failure, the borrowing of money, and other efforts to sell in Charleston and elsewhere, and the exigencies of the case, which led finally to the sale. ceeds to state the contract for the sale of the stock to defendants. Patton & Mustian, and says that it was made without consulting with the finance committee or any member of the city council, or any other person whatever. Defendant demes that he made or attempted to make, any contract in reference to the sale of said stock to said Patton & Mustian. hinding on the said mayor and council, but avers that the proposition or agreement was reduced to writing, for the purpose of submitting the same to the mayor and coungil for their ratification or rejection; that on Monday night, the 19th of November, 1855, the proposition, as reduced to writing, was reported to the mayor and council, at their regular meeting, who, upon consideration thereof, in the lawful and usual exercise of their power and authority, ratified and confirmed the same as their own lawful and binding contract. He annexes a copy of the report and proceedings of council. as exhibit (A) to his answer.

The said answer farther states, that the mayor and council are under obligation to pay, in the City of New York, on the 27th day of December, then next, \$31.000, for which one thousand shares of stock are pledged; and a further sum of \$25.000 will be due on the 1st of July, then next; that the difficulty of raising a large sum of money in a short time, distanted the propriety of making arrangements to raise so large

Semmes vs. M. & C. Columbus.

a sum of money before the arrival of the day of payment; that a contrary course must result in the necessity of exposiing the stock at auction, and subject it to the effect of combinations amongst capitalists, and a sacrifice of it. In making the terms of agreement for the sale of said stock, he did not act under the resolution of April, as the action contemplated by that resolution had taken place, and the committee having reported, were considered as discharged; and that the committee on finance had nothing to do with it, as it had to undergo the consideration and ratification of the mayor and council. The terms of agreement were made without advertisement. Defendant denies that the terms of said agreement were privately made, if complainants intend to infer by said allegation, that they were made with any purpose of fraud or concealment; the propositions for said stock were made and discussed at a meeting of the board of directors of the Muscogee Rail Rail Company, and were agreed upon directly afterwards, on Saturday the 17th of November, 1855, and they were reduced to writing and signed on Monday afterwards. Defendant denies that the stock was sold below its Market value: that 80 cts. was the highest price which the council or their committee had been offered for it.

The answer proceeds to state what citizens of Columbus had offered stock at, and what it was then offered at. Defendant answers, further, that the price obtained for said stock was adequate and fair, and that it will release the city from her indebtedness on account of her subscription. In August or September last, the board of directors of said company convened to consider of the profits, and to make a dividend for the six months previous; and finding the earnings insufficient, it was about being declared, when the mayor of the city interposed because of the disastrous consequences likely to result therefrom, in the depreciation of the stock, and driving the city authorities to resort to taxation to pay the interest, and suggested that a dividend be made, payable in December, 1855, which was done; the mayor and council relying on their dividends on the stock to pay the

Semmes vs. M. & C. Columbus.

semi-annual interest on the bonds, the uncertainty of this reliance was a good reason why they should dispose of the whole interest in the road, and induced defendant to believe that the price offered for the stock was adequate and fair. addition to this reason, the original work on the road was not of the most substantial sort; and the last report of the board of directors showed that contracts had been made for work to about \$100.000, and which had been paid for in stock. diminishing the value of it. The iron was light and unsubstantial, which had been laid on the road; and from opinions entertained by stockholders, it must soon be re-laid with a heavier rail. Defendant does not admit that the city council can re-consider a contract that it has made; but in this case. the proceedings of council at the former meeting were read and approved, and no motion made to re-consider.

Patton & Mustian submitted the security for the performance of said contract; that the security they offered was a cash payment of \$26.000, deed of trust with power of sale on 1800 shares of stock, and mortgage on upwards of \$50.000 worth of real estate and slaves, in and about the city of Columbus; that every member of the committee was satisfied with the security; that two of them were willing to report the same as satisfactory; that two of them declined signing it on the ground that they preferred devolving on the council, which would meet in three or four days, the responsibility of judging of said securities. Defendant denies that the consummation of the contract would operate as a great fraud upon the people and property holders of the City of Columbus, but avers it to be a good contract.

The defendant further answering, from his information and belief, says, that Paul J. Semmes, the verifying complainant in said bill, before he made and placed his jurat to said bill, made application to said defendant, Patton, to be let in as a partner to said contract; that Seaborn Jones, the Solicitor for complainants, and Charles Cleghorn, who presented the bill for the sanction of the Chancellor, and before he presented it, applied to defendant, Mustian, to be let in as a

Semmes vs. M. & C. Columbus,

partner to the contract; denies fraud and unfairness in the contract, and avers that it was legally made, and is binding.

On the filing of the answers aforesaid, the Judge of the Superior Courts of the Chattahoochee Circuit, granted an order, at the instance of defendant's Counsel, that the complainants show cause, at Talbotton, in the county of Talbot, on the 18th December, 1855, why the injunction in said cause should not be dissolved, on the grounds—

1st. That there is no equity in said bill of complaint.

2d. That the answers above filed, have fully sworn off all the equity contained in said bill of complaint.

The complainants appeared at Talbotton in obedience to: the order, when, by the consent of all parties, the said bill was dismissed as to three of the complainants, Joseph B. Hill, Robert B. Murdock and Joseph Kyle. The other complainants objected to the Judge's hearing any argument or making any order in said case at Talbotton, on the ground that the case is pending in the Superior Court of Muscogee County, and that all the parties, both the complainants and defendants, lived in that county, and that they could not be called out of the county of their residence, and out of the county in which the suit was pending.

The Judge over-ruled the objection, and complainants excepted.

Complainants' Counsel then objected that said case could not proceed, as the answers of Hall, McKendree and Bedell, the finance committee, had not been filed; which was overruled, and plaintiffs excepted.

Complainants then moved to make an amendment to their bill, and that the injunction granted in said case should not be dismissed till the answers of the defendants were filed to said bill as amended; and after hearing argument on the bill, amendment and answers as filed, the said Judge allowed the said amendment to be made to said bill, and ordered the injunction to be dissolved.

Complainants excepted.

VOL XIX-61

Error is assigned on each of these exceptions.

The complainants amended their bill, and alleged-

That on Saturday, 17th November, 1855, at a meeting of the directors of the Muscogee Rail Road Company, it wasstated by the defendant, Patton, the president, in the hearing of Williams, the mayor, and one of the directors of saidcompany, that the Savannah papers quoted the stock at \$90 per share; that Williams, after hearing it, offered to take-\$150.000 or \$151.000, for 1800 shares of said stock owned by the City of Columbus; that Patton soon after said he would take the stock at that price, and that Mustian, also one of the directors, said he would go his halves, which was agreed to; and thus, the stock of the city, amounting to-\$180.000, was thus bargained away, on Monday, the 19th of November; the contract was reduced to writing, and the faith of the city pledged to carry it out; that the Muscoges Rail Road stock was quoted at \$90 a share in the Savannah newspapers; that when the said Williams reported said agreement to the city council, he did not inform them that the said stock was quoted in the Savannah papers to be worth \$90 a share, or that Patton had said so; nor did he report .said contract as a bare proposition, but as an agreement already made; and induced them to believe, and especially some of the members of the finance committee, that the council had given him, as mayor, authority to sell said stock; some of the council and of the finance committee voted to ratify the agreement under that belief, and would not have sovoted, but would have voted for a postponement until the next meeting, if they had known there was no such authority: that other offers might have been made; that J. J. McKendree, a member of the finance committee, stated that he had assurances from gentlemen who were able to comply, that a higher price would be given for said stock; the names of the gentlemen he could not then give.

The amended bill further states, that during the week, towit: on the 22d, and before the details of the contract had been carried out and the securities had been accepted from

said Patton & Mustian, Paul J. Semmes, Scaborn Jones and Charles Cleghorn, did make an offer to take 1800 shares of the stock at \$87 per share, being \$5600 more than had been agreed to have been paid by said Patton & Mustian; that when the offer was made in writing, the said Williams, the mayor, refused to read it or to permit it to be read to him; and the same was then handed to John J. McKendree, one of the finance committee; that about ten days before said contract was entered into, the said Muscogee Rail Road had made an advantageous arrangement with the Central & So. West. Rail Roads, by which the proportion of freights, of passengers, merchandize, &c. from Columbus to Savannah, and from Savannah to Columbus, was increased near twenty per cent.-tending to increase in that ratio the share of the profits of said stock, which was before bringing 8 per cent. dividends, and that it was well known to Patton & Mustian and Williams: that it was not made known to city council by Williams, at and before he urged the ratification of the agreement, and that it was unknown to the members of council when they were urged to ratify.

City owns a few more shares in the rail road company—some sixteen or eighteen—number unknown to complainants, but known to defendants, which amended bill asks may be set forth, with the reasons that they were not sold; that after city council had determined to sell part of said stock, application was made to said McKendree, one of the finance committee, to get some at \$85 a share; and he stated that it had been informally taken among the members of council, and that they had concluded not to sell at less than \$90 per share; which statement was some weeks before the agreement with Patton & Mustian.

S. JONES; H. HOLT, for plaintiff.

JOHNSON; WELBORN, for defendant.

By the Court.—McDonald, J. delivering the opinion.

The first error assigned by complainants' Counsel is, that the Judge called the defendants out of their county, and required them to argue the motion to dissolve the injunction in Talbot County.

- [1.] The parties, complainant and defendant, resided in Muscogee County, and the cause was pending in that county. The Chancellor may order an injunction, instantly, on the ex parte showing of the complainant; and the exigency of the case frequently requires that he should do it. But the writ of injunction is a strong process, and the party against whom it is granted should be allowed an early opportunity to move to set it aside. The 4th rule in Equity enables him to do it.
- [2.] Ex parte injunctions, in Georgia, are always granted on terms, because they are subject to the operation of that rule; and the terms prescribed by it are as binding as if they were incorporated in the sanction of the Judge.

The hearing of a motion to dissolve an injunction, is no more the trial of the case, than the hearing of an application for an injunction; and the argument may be heard at Chambers.

[3.] That several of the defendants had not answered the bill, was no sufficient objection to hearing the argument and determining the motion to dissolve the injunction. The remedy sought by the bill, was against the Mayor and Council of the City of Columbus. If there was equity in the bill warranting the interposition of a Court of Chancery, it was against the mayor and council; and the city council had answered under its corporate seal, and the mayor, who, it is apparent, from the bill and the amended bill, was more conversant with the facts charged than any one else, had answered under his oath. No decree for a perpetual injunction would go against the defendants who had not answered, nor could their answers, however made, have the slightest influence un-

der the allegations of complainants, against the defendant, the Mayor and Council of the City of Columbus. The defendants against whom the complainants claimed the equity, if any, had answered; and if the answers were full and denied the equity, the injunction ought to be dissolved. The Court, therefore, committed no error in refusing to postpone the argument, and in dissolving the injunction without the answers of the other defendants.

[4.] The amendment of an injunction bill, unless allowed by the Chancellor without prejudice to the injunction, displaces the injunction. In this case, the motion to amend the bill was allowed, but the Court refused to grant it as asked for, to-wit: that the injunction should not be dissolved until the answers of the defendants were filed to the bill as amended; and the Court, after allowing the amendment, ordered the injunction to be dissolved.

The party might have amended his bill as a matter of right, and to have refused it would possibly have been error in the Court; but the allowance of an amendment by the Court which the complainant could have made, as a matter of right, does not necessarily operate as a continuance of the injunction until answer. On a motion to dissolve an injunction, on the ground that there is no equity in the bill, the facts alleged in the bill must be taken as true; and when the motion is predicated on the denial of the equity by the answer, the answer is to be considered as true.

If the motion be resisted, on the ground that the complainant has amended his bill, alleging new facts which have not been answered, the Chancellor, (waiving the effect of the amendment as a dissolution of the injunction,) will extend his consideration to the amendment bill, to the manner and substance of the allegations therein, and determine whether they afford sufficient grounds for retaining the injunction, if it ought otherwise to be dissolved. The Court, therefore, committed no error in deciding on the motion to dissolve, before defendants answered the amended bill.

Did the Court err in dissolving the injunction, on the grounds taken in the motion?

It is insisted by Counsel for plaintiffs in error, that the Acts of 1845 and 1853, inhibit the mayor and council from making contracts of the description and magnitude of that made for the sale of the rail road stock, and in the manner in which that was made.

Let us, for a moment, examine the power of the mayor and council to make contracts, and then look to the Acts of 1845 and 1853, and see how far they control it. By the 12th section of the Act of 1853, the mayor and members of council are vested with special powers to make all contracts, in their corporate capacity, which they may deem necessary for the welfare of the city.

[5.] The power conferred by that Act to contract, has no limit. It is full; and they are vested with the largest discretionary powers. The Act of 1845 declares, "that no vote, resolution or order of said mayor and council, for the payment of money, or for the performance of any act or measure involving an amount exceeding the sum of three hundred dollars, except the regular and current expenses of the city, shall be of force and effect, unless it be by the act of a majority of the whole board, at two successive meetings thereof; which said vote, resolution or order, shall be published in one or more of the public Gazettes of Columbus, between the first and second passage." (Acts of 1845, p. 67, Sect. 7.) This Act goes to the extent, and no further, to prevent the mayor and council from embarking the money or credit of the city, exceeding the amount of three hundred dollars in new enterprizes, except the current expenses of the city, without giving notice to the people and re-affirming the measure after notice, by a vote of a majority of the whole board. It has no reference to a case where the money or credit of the city is already committed. It has no reference to the application of money or assets to the payment of debts; for they create an obligation, that the resolutions of the corporation, whether adopted voluntarily or by the counsel of

the people, cannot lawfully resist. It only has reference to such cases of projected expenditures of money, as it might be supposed an interested constituency would desire to make their wishes known upon.

It seems that the subscription for the stock in the Muscogee Rail Road, was made, and the city bonds were issued in payment, after the passage of the Act we have been considering; and it is to be presumed that the matter was submitted to the citizens, in conformity to the Act; and if so, the subscription, so far as that objection is concerned, creates an obligation to pay; and the obligation to pay is a sufficient authority to pay, without new votes, resolutions or orders.

The Act of 1853, page 242, is more explicit than that of 1845. It is declared by that Act, to be unlawful for the Mayor and Council of the City of Columbus to loan the credit of said city, contracting debts, issuing the bonds of the city, or using, in any way, the funds of said city, beyond the sum of ten thousand dollars, for the purpose of being expended, or otherwise applied, beyond the corporate limits of said city, or in aid of any rail road company, or any other project foreign to the government of said city, without first passing, by a majority of said mayor and council, a resolution to such effect. This resolution is to be published and submitted to the voters of the city; and if it be approved by a majority of those who vote on it, it is to be again submitted to the mayor and council; and if it be again approved by them, it becomes a binding ordinance of the city.

The sale of the rail road stock does not fall within the prohibitions of this Act. It is not the loan of the credit of the City of Columbus; it is not the contracting of a debt; it is not issuing the bonds of the city; it is not using the funds of the city, for the purpose of being expended or applied beyond the corporate limits of said city, or in aid of any rail road company, or any other *project* foreign to the ordinary purposes of the government of said city. It was a resolution affirming an agreement for the sale of certain assets of the city, to pay the debts of the city; it was not a resolution ta

issue the bonds of the city, but to convert the assets of the city for the purpose of paying the bonds of the city, which had already been issued.

There is nothing, in either the Acts of 1845 or that of 1853, to interfere with the broad discretionary powers of the mayor and council to deal with the assets of the city, according to their best judgment, to pay its debts.

[6.] The Counsel for plaintiff in error insists, again, that the mayor and council are only trustees for the citizens, and are bound, like all trustees, not to sell or dispose of the property of the city at an undervalue. The mayor and council are vested, by the Act which creates them, in all matters of contract, with special discretionary powers. They may make any contract which they may deem necessary for the welfare of the city. They are not trustees, in the technical sense in which Courts of Equity regard that term. Courts of Chancery, from their inherent jurisdiction, have assumed the control over trustees in the discharge of their duties. (Hill on Trustees, 42.) But these are trustees against whom the only remedy is in a Court of Chancery. The mayor and council, if trustees, do not belong to that class.

Executors and administrators, factors and agents are, in one sense, trustees. They all have the property of others in their possession, and are bound to fairness and honesty in dealing with it; but Courts of Chancery have never assumed to control them in the discharge of their duties. they ever assumed control over corporations. They make an exception where corporations hold to charitable uses. have disclaimed jurisdiction where an officer had misapplied the corporate property to purposes not corporate. Chan. Rep. 384.) In the case of The Mayoralty of Colchester vs. Lawton, the Lord Chancellor held, "that there was no instance of a trust attaching upon the misapplication of funds by corporations, except in the case of corporations holding to charitable uses." (Cited in the above case from 1 Veascy & Beame, 226.) The bill in this case cannot be

sustained, therefore, against the defendants, on the ground, simply, that the mayor and council are trustees.

[7.] In the case of trusts cognizable in a Court of Equity only, if the trustees have a discretionary power, to be exercised according to their judgment, a Court of Equity will not interfere to control the trustees acting bona fide in the exercise of their discretion. (Hill on Trustees, 488.) There are cases which might seem to conflict with this rule, but it will be found, when examined, that they do not clash with it. In the case of Cloud vs. Martin, (1 Dev. & Bat. Law, 397,) the testator directed that his grand-son should be raised and taken care of, at the direction and care of his son, J M and should be instructed in the English, Latin and Greek languages, and he appointed J M one of his executors. Court put its decision in that case, it is true, upon its power to control a trustee in the exercise of a discretionary power, holding that such jurisdiction was established. That is true. if such trusts as the above are to be considered trusts, in which the trustees have discretionary powers. I respectfully insist, however, that that was not the description of trust created by the testator's will. The will imposed two duties on J. M. in regard to the rearing and education of the testator's grand-son-the one as executor and the other as trustee. The raising, and taking care, and education of the grand-son, was no part of the duty of J M as executor. By proving the will, however, he accepted the independent trust which the will created for that purpose. As executor, he was bound to furnish the funds from the testator's estate, to carry out The will of the testator was positive and direct. There was no discretion with J M in reas to the trust. The grand-son of testator was to be raised and gard to that. taken care of, and to be instructed in the English, Latin and Greek languages. The raising and taking care of the grandson was to be at the direction and care of his son. vision of the will constituted J M the trustee for the specified purpose.

vol. xix-62

If J M had not been executor and had manifested his acceptance of the trust for the grand-son, by receiving funds from the executor for the purpose of carrying it out, and had refused to apply the funds and direct the raising and taking care of the grand-son, it would have been the ordinary case of a trustee accepting a special trust for an infant, and refusing to execute it. The Court will, in such case, compel the trustee to discharge a duty which, while trustee, he has no discretion to refuse.

In Fronty vs. Fronty, (1 Bailey's Equity, 518,) Judge O'Neall lays down the true rule: "In the execution of a general power, there can be no rule but the discretion of the party to whom it is confided. In a limited one, the limitations contained in it constitute the rule by which it is to be executed. In the former, no Court can undertake to control that which the party creating the power intended to leave to the honesty, discretion and good faith of the person to whom he confided it." But none of these cases have reference to corporations, or the persons who constitute the body corpor-The mayor and council have authority to pass bylaws for the good of the city. They must exercise their judgment, and what Court can control them? They have: power to make such contracts as they may deem necessary for the welfare of the city, and what Court has the right to supervise and control their judgment? Where the corporation have the power of doing an act or not, at their discretion, the Court will never interfere with the lawful exerciseof the discretion. (Grant on Corp. 231, note u.)

[8.] Where a body has a discretion conveyed to them, an erroneous exercise of that discretion, however plain the miscarriage may be, and however injurious its consequences, they shall not answer for it to the party. (Grant on Cor. 252, note r.)

It often happens that the ordinances and contracts of municipal corporations, however fairly and honestly passed or made, not only do not meet the approval of all the citizens. but are censured and condemned by a part of them; and yet.

such disapproval, however plausibly sustained, would not justify the Court in interfering with the legitimate exercise of the functions of the body. It will be remarked, that the suit against the defendants in this case, is not for a fraudulent breach of duty. It is against the corporate body, and not against individuals, for a breach of trust. It is to enjoin the corporation from executing a contract which it had made, and in regard to which it had a discretion—and which discretion, it is not charged, has been fraudulently used. sisted that the facts alleged by complainants, exhibit the transaction in such a light as to call on the Court to prevent the execution of the contract. Before the Court can interfore, it must infer fraud-a charge that the complainants have no where made directly. The Court is not prepared to say, that in making the sale of the stock, there was eitlier an abuse or fraudulent use of discretionary power by the mayor and council. If the mayor, Williams, without authority, and without consultation with the committee on finance. did enter into a contract with Patton & Mustian, to sell them nearly all the stock owned by the city; and if the contract was signed, and the committee did not know it until it was submitted to the board, and it was submitted to the council; and if a postponement was refused by a majority of the board, who directed the committee to consummate the contract, there is nothing in all this to impugn the honesty of the From William's acknowledged want of authority to make the contract, he submitted it to the council. he had made the contract with authority, it would have been . complete and perfect without the ratification of the council. Facts and circumstances are charged by complainants, which, it is argued, impeach the fairness of the contract. not draw that inference from them. That the agreement was privately made, and without notice, is no evidence of fraud. Some of the most prudent and judicious men in the country, sensible that frauds are often committed at public sales of property, in making their wills, direct their executors to make private sales. Combinations are very apt to be formed where

the sale is public, the value of the property great and the competition is likely to be inconsiderable. The mayor and council, it is probable, subserved the best interests of the city by selling the stock privately.

[9.] That the stock was sold for less than its value, and below what others would have given for it on the same terms and conditions, is a general charge, and taken alone, is not entitled to much influence in determining the moral character of the contract. But it is elsewhere stated, specially, that other gentlemen, who are named, offered \$87 per share for the stock during that week, and before the finance committee had carried out the details and accepted the securities of These charges, general and special, con-Patton & Mustian. stitute the strength of the objection to the contract based upon the inadequacy of the consideration. The price offered amounted, in the aggregate, to \$156.600. It was sold for The difference is not so great as to produce, on **\$**151.000. any mind, the impression that there was fraud, or the sale would not have been made. "Unless the inadequacy of price is such as shocks the conscience and amounts, in itself, to conclusive and decisive evidence of fraud in the transaction, it is not, of itself, a sufficient ground for refusing a specificperformance." Coles vs. Trecothick, (9 Vesey, 246.)

The allegation, that the stock was quoted, in the Savannah papers at \$90 per share, is not an allegation that it was worth that sum. Indeed, the complainants, if it is to be presumed they offered for it what they considered its value, did not believe it to be worth the quotation price.

That Williams, on being informed of the price at which it was quoted, proposed to sell, and an agreement was drawn up, reported to and ratified by the council, does not impeach the transaction. If necessary to effect a sale, it was a propitious time to offer it. If the market became excited, or the stock had been advanced by the alleged recent arrangement with the Central and South-Western Rail Road companies, it presented a better opportunity for effecting the sale of so

large an amount of stock. Without it it might have been impossible to have sold the stock at the price given for it.

That a motion to postpone action on the contract was voted down by the council, and the contract was immediately ratified, must be regarded as the decided judgment of the council, that the contract was advantageous to the city, unless impure motives for official conduct be imputed to them.

It is not pretended, in the record, that they had a personal interest in the subject, different from that which was common to all the citizens of Columbus. It would be rash to presume that those who voted against the ratification, voted under the influence of sinister purposes; and yet, they have no higher claim to exemption from censorious imputations, than those members of council had who voted for the ratification.

But little effect can be given to the charge, that Williams had induced some of the members of council, and especially the committee on finance, to believe that authority had been given to him to sell the stock, and that they voted for the ratification under that belief. The proceedings of council, on the report of the mayor, showed that no authority had been given to sell the stock. A sale under authority, needs no ratification to give it validity. But if it is to be understood that the authority extended to making a contract subject to ratification and no further, which was equivalent to authority to make a proposition only to sell, then the refusal to ratify would have been no repudiation of the act of the mayor or action of the council giving such qualified authority. proposed purchaser could not have been misled; and the rejection of a contract made with such a qualification, could not have given rise to complaint. The delicacy of the members of council, therefore, whose votes were controlled by the alleged consideration, was unnecessary. If a Court of Equity, then, had jurisdiction to interfere in such a case, 'the charges taken separately, suggest no sufficient ground for interfering by injunction; and taken collectively, they do not make out a case of suspicion of wrong, injustice or fraud against the corporate authorities.

Taking the answers of defendants in reply to the charges, and it is difficult to determine how the city could have been relieved from its imminent embarrassment without applying the stock to the payment of the debt incurred by its subscription.

As the answer of the city council is under the corporate seal only, and not sworn to by any member, we will refer to the sworn answer of the mayor only. No part of the large city debt created by the subscription for the stock had been paid. The first instalment of \$25.000 was to become due in July, 1855. In April before, a sale of stock was ordered to meet this payment. An offer was had for \$15.000 only, and that at \$80 per share. Not being able to sell stock, a loan was resorted to, and the mayor and committee on finance were authorized to borrow \$30.000 on the best terms they could.

They borrowed, on mayor's draft and some of the committee's indorsement, and on pledge of 700 shares of stock, \$30.060, with power to the lender to sell in thirty days, on They expected, after the payment of the July instalment, to sell stock and pay the borrowed money; but there being no demand for the stock, they could not sell, and had to resort to a second loan to pay the first. rowed in New York, at 90 days, \$31.000, and pledged, as security, 1000 shares of the stock. They endeavored to sell in Charleston, and failed. The \$31.000 borrowed in New York, was to be paid 27th December, and another instalment of \$25.000, would become due in July. The mayor considered it best to sell all the stock and pay the entire debt, and made the agreement, accordingly, with Mustian & Patton, without consultation with any person whatever. no contract, (and did not attempt to make one,) binding on the city. What he did, was submitted to the council and ratified by it. If the stock sold had depreciated after the sale, and the city had been subjected to heavy losses, and the inhabitants to taxation, because of the failure to sell, the conduct of the mayor and council, in losing so favorable and

opportunity to relieve the city, might have been the subject of animadversion. If the stock has appreciated, and the purchasers are likely to make something, even if it be considerable, that cannot be admitted, in Equity, as a ground of relief against a contract untainted with fraud. Suppose there was folly or want of judgment in the mayor and council in making the contract, if there was no fraud, it is binding. (8 Price's Repts. 620.)

But what benefit is to accrue to the complainants, if the defendants are enjoined?

[10.] What certain advantage is to enure to the citizens of Columbus? The complainants are not pledged to take the stock at the \$87 per share offered; they do not ask it. In fact, the parties who made the offer, are not all complain-They make no deposit of the money necessary for the relief of the city; nor do they exhibit the securities that they would offer for the unpaid balance, and tender them in a manner to enable the council or the Court to judge of them. In sales by masters, in Chancery, which are sales by the Court of Chancery, the biddings may be opened for sufficient reasons; but whenever that is done, a deposit must be made of an amount exceeding that for which the sale was made. The Court will not interfere unless some beneficial object is to be accomplished by it. But the sale opposed in this case, is not a sale by a Court of Chancery; it is a sale by one party to another, each party having the power and right to contract, and no complaint made by either party to the contract of fraud or unfairness; and, so far as the record speaks, there is no ground of complaint of one party against the That the complainants are property holders in the City of Columbus, under the facts in the record, does not place them in a higher position, as suitors in a Court of Chancery, than that of the parties.

They are willing to forego their rights as citizens and property holders, provided they can be allowed to partake of the profits of a contract, to prevent the execution of which

their bill is filed, on the basis of probable injury to them as property owners in the city.

Whether the injunction shall be held up, is a matter of sound, legal discretion with the Chancellor. He has considered it his duty to dissolve it. We are not prepared to say that he ought not to have dissolved it. His judgment is therefore affirmed.

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF THE STATE OF GEORGIA,

AT ATLANTA,

FEBRUARY TERM, 1856.

Present—JOSEPH H. LUMPKIN, HENRY L. BENNING, CHAS. J. McDONALD.*

No. 88.—MARY FERNANDER, plaintiff in error, vs. ISHMAEL DUNN, adm'r, defendant.

[1.] If the vendee of land be evicted, he can recover only the value of the land, at the time of the purchase, with interest, for so long a time as he pays mesne profits, and the costs of the ejectment that may be brought against him.

In Equity, from Fayette Superior Court, Tried before Judge Bull, March Term, 1856.

This was a bill filed by Dunn, as administrator of John Sellars, deceased, against Mary Fernander, formerly Mary Palmer, and administratrix and sole heir of John Palmer, her

^{*}Note-Judge McDonald was forced, by indisposition, to be absent during the latter part of this term.—Reporter.

Fernander vs. Dunn, adm'r.

former husband. The bill alleged, that in 1836, John Palmer made and delivered to Sellars, for a valuable consideration, to-wit: \$250 00, a deed of warranty to lot of land 224, in then Lee, now Sumter County; that the number of the lot was left blank in said deed, but that said lot was the one meant and intended to be sold; that Sellars sold said land to one McLendon, and gave his bond for titles, which bond passed by assignment to one McCrea; that said Palmer never took out the grant to said lot, whereby it reverted to the State.

In 1846, McCrea sued Sellars on said bond for titles. Pending the action Sellars died, and complainant, his administrator, was made a party to the suit.

In September, 1851, a judgment was rendered against him for \$1.108, with costs, which he has paid; that Mrs. Fernander was notified of the pendency of this suit. The bill prayed that she be decreed to make good to complainant the amount of said verdict, with costs, charges and expenses of litigation.

The answer of Mrs. Fernander denied that Sellars paid anything for the land, but said the bargain was made in her presence, and that Sellars gave his note for Two Hundred. and Fifty Dollars, agreeing, at the same time, to take out the grant for the land; that he afterwards, when Palmer was intexicated, contrived to get the note out of his possession, and never returned it, though she had heard him admit having it and promise to return it; that Palmer had employed Sellars to go and sell the land for him, who returned and said the best offer he could get was two hundred dollars, and offered two hundred and fifty himself, which was agreed to, and the trade consummated as before stated; and the answer charged that Sellars had then contracted to sell the land for five hundred dollars, which he afterwards did. The answer denied any notice of the law-suit on the bond. The answer admitted that lot 224, was the lot intended to be conveyed in the

On the trial, the complainant produced a copy of a written:

Fernander ec. Dunn, adri'r.

notice of the suit of McCrea, and a demand to come forward and defend, which he made affidevit to having served on the defendant.

JAMES BLOODWORTH, a witness to the deed from Palmer to Sellars, testified that he understood from the parties, at the time that Sellars bought the land, because Falmer was in debt to him; heard nothing about the grant.

MALCOLM BETHUNE testified, that he heard Palmer and Sellars talking about the trade; that Palmer had given Sellars a power of attorney to sell it for him. Sellars said he could get \$300 in sock for it, and would give \$250 in cash, himself. Palmer agreed to take it, because he said he was owing Sellars. Palmer said he would get one of his relations to take out the grant, but he thought it was already taken out.

JEPTHA LANDRUM testified, that he had frequently heard defendant speak of the suit against Sellars, while it was pending, and say that she had been notified of it by the complainant.

The Jury found for complainant the sum of \$672 30, with costs.

Whereupon, defendant moved for a new trial, on the following grounds:

1st. That the Court erred in charging the Jury, that when a defendant, in his answer, denies facts, the truth of which denial he could not know, though said answer should be responsive to the bill, it did not require two witnesses, or one witness and corroborating circumstances, to contradict him; there being no circumstances or facts in the bill and answer to justify such a charge.

2d. That the Court erred in charging the Jury, that if they believed that a debt was extinguished to that amount, in the sale of the land by Palmer to Sellars, that it would be sufficient consideration, there being no evidence of any particular debt, or any particular amount of indebtedness.

3d. That the Court erred in charging the Jury, that the description of the land could be supplied by parol proof; and

Fernander vs. Dunn, adm'r.

that it was not necessary to have the deed reformed to enable the plaintiff to recover.

4th. That the Court erred in charging the Jury, that the measure of damages was the purchase money, with interest from the sale of the land; the evidence being, that the lessor of the plaintiff enjoyed the possession of the land for several years before the outstanding title accrued; during which-time there was no liability for mesne profits.

5th. That the Jury found contrary to the charge of the Court, the Court having charged them, that in order to contradict the responsive answers of a defendant to a bill in Chancery, there must be two witnesses, or one witness and corroborating circumstances; the answers of defendant being, that complainant's intestate had never paid one cent for the land; and that he agreed, in the original trade, to grant said land.

6th. That the verdict of the Jury is contrary to evidence. The Court refused a new trial; and on this decision error is assigned.

D. F. HAMMOND, for plaintiff in error.



WHITAKER, for defendant in error.

By the Court.—LUMPKIN, J. delivering the opinion.

We affirm the judgment of the Court below, on all the grounds taken in the motion for a new trial, except his charge as to the measure of damages in this case. Usually, it is the purchase money, with interest from the sale of the land. But the proof here is, that Sellars, the intestate of the complainant, and his assigns, enjoyed the possession of the land for several years before the paramount outstanding title accrued, viz: before the lot was granted by the State; During this time, there was no liability for mesne profits; and consequently, no interest on the purchase money should

Anderson et al. vs. Sego.

be computed during this period. (9 Johns. Rep. 324; 12 Ib. 125; 18 Ib. 20; 8 Caine's Rep. 111; 17 Ga. Rep. 602.)

No. 89.—Thomas Anderson and others, plaintiffs in error, vs. James M. Sego, defendant in error.

[11.] A bill in Equity ought, in general, to be brought only in some county in which a defendant resides.

In Equity, in Dooly Superior Court. Decision on demurrer, by Judge Powers, April Term, 1855.

A fi. fa. controlled by James Anderson, William Q. Anderson and Thomas Wooten, against Charles H. Rice, was levied upon certain lots of land in Dooly County, to which Sego interposed a claim. Subsequently, Sego filed a bill in Dooly Superior Court, setting out an equitable title in himself to these lots of land, and praying an injunction upon the owners of the fi. fa. and the Sheriff who levied it.

To this bill a demurrer was filed, among others, upon the ground, that neither of the defendants (except the Sheriff) was a resident of Dooly County.

The Court over-ruled the demurrer, and this decision is assigned as error.

Dawson, for plaintiffs in error.

Mounger, for defendant in error.

Anderson et al. vs. Sego.

By the Court.—Benning, J. delivering the opinion.

This is not a case "respecting titles to land."

[1.] It is a case in which none of the parties in interest reside in Dooly, the county in which the case was brought. The Sheriff of that county, though made a party to the bill, was not a necessary or a proper party to it. When the claims were put in, the fi. fa. passed out of his hands, and when the ft. fa. passed out of his hands, his connection with the case ceased. Besides, the case was one in which he ought never to have been a party, not even when he had the fi. fa. in his hands. An injunction against the owners of the fi. fa. would have effectually reached him. It was never like a case in which a Sheriff has in his hands a fund on which there are different claimants, some of whose claims are such that the Sheriff may fail or refuse to recognize them, without a special order from a Court to do so.

There is nothing special in the case, to take it out of the general rule, that every case, not criminal or not respecting. the titles to land, should not merely at Law, but also in Equity, be tried in the county in which some defendant resides. object of the bill was to compel the owners of the fi. fa. to make their money out of other lauds than those on which the fi. fa. had been levied—than those which are claimed by the complainant, as a purchaser from the defendant in f. fa. viz: out of lands which had belonged to the defendant in f. fa. at the time of his death, and which had come to his administratrix as assets, and which were still in her possession as assets. This is an object which it will be as easy to accomplish by a suit in the county of the residence of the administratrix, or . by one in that of the residence of some one or more of the owners of the fi. fa. as it will be to accomplish by a suit in the county of Dooly. And if so, the suit ought to be brought in some one of those counties. In such a case, the maxim, that equity follows the law, ought to apply. (See Gilbert vs. Thomas, 3 Kelly, 575; Jordan vs. Jordan, 16 Ga.)

Nolan, trustee, &c. vs. Chambers.

We think, therefore, that the ground of the demurrer, that the defendants did not reside in Dooly, was a good ground, and that on that ground the Court below should have dismissed the bill.

No. 90.—James Nolan, trustee, &c. plaintiff in error, vs. Peter H. Chambers, defendant.

[1.] If there is strong evidence in favor of the verdict, this Court is not obliged to grant a new trial, although there is a preponderance of evidence against the verdict; and this Court will not do it if the Court below has refused to do it.

In Equity, from Butts Superior Court. Tried before Judge STARKE, March Term, 1855.

James Nolan, claiming as trustee for his sister, Sarah Chambers, the wife of Peter H. Chambers, as well as for certain parties entitled in remainder, in case of her dying childless, by virtue of deed of trust of certain negroes, executed to him by his father, William Nolan, filed his bill in the nature of a bill of ne exeat against the said Chambers, in whose possession some of said negroes were, to require him to give security for the forthcoming of the property, to answer the claims of those entitled in remainder.

The defendant repudiated said deed of trust, and claimed, in his answer, that before the execution thereof, the said William Nolan had given the negroes to his daughter, by which they belonged to defendant by virtue of his marital rights.

The testimony on both sides was voluminous, and will be referred to in the opinion of the Court. The Jury found for defendant, and complainant moved for a new trial, on the

Nolan, trustee, &c. vs. Chambers.

grounds—that the verdict was against the evidence, and against Law and Equity. The Court refused the new trial, and this decision is assigned as error.

FLOYD, for plaintiff in error.

D. J. BAILEY, for defendant.

By the Court.—Benning, J. delivering the opinion.

Among the negroes named in the deed of trust, were Susan and her children. She and her children did not go into the possession of Peter H. Chambers. In respect to them, there is no issue in the case; and therefore, in respect to them, there is and can be no decision.

The other negroes named in the deed of trust, did go into the possession of Peter H. Chambers; and as to them, there are two questions. The first is, whether they had not been given absolutely to Mrs. Chambers, by her father, before he made the deed of trust? Peter H. Chambers insists that they had been; and the trustee, James Nolan, insists that they had not been.

This question is one of mere evidence; and there was evidence on both sides of it. And the evidence on the side in favor of which the verdict went, though perhaps not as strong as that on the other side, was yet far from weak.

That being so, it may at least be said, that with regard to this question, there is nothing to constrain this Court to grant the new trial. And that being so, it will not interfere and say the discretion of the Court below, in refusing the new trial, was improperly exercised.

The second question is, whether Peter H. Chambers did not assent to the deed of trust, and accept the negroes in his possession under it?

's to this question, Peter H. Chamber's position is, that id not assent to the deed; or that if he did, his assent

Robinson et. Wilson.

ought not to bind him, because he says, that at the time of such assent, if at any time there was such assent, he did not know his rights; or if he knew his rights and assented, that he did not, in assenting, act voluntarily.

This position, too, is one exclusively for the Jury. But whether there was any evidence in favor of it or not, it is not necessary for us to say; for we have already said, in effect, that the evidence was such, on the first question, as to support the verdict; and that question was a decisive one, it being whether the negroes had not been absolutely given to Mrs. Chambers before her marriage with Peter H. Chambers. If, on this question, the evidence was such as to support the verdict, of what consequence is it what the evidence was on other questions?

We affirm the judgment of the Court below.

No. 91.—John Robinson, plaintiff in error, vs. John T. Wilson, defendant.

- [1.] The meaning of the Partial Failure of Consideration Act of 1836 is, that whenever the case is such, that by the old law, the plea of a total failure of consideration might be pleaded to it, if the facts that exist for a plea make out as much as a total failure, it is such, that by the said Act a plea of a partial failure may be pleaded to it, if the facts that exist for a plea make out no more than a partial failure.
- [2.] By the Amendment Act of 1854, a plea of a partial failure of consideration, may be filed after the first term.
- [3.] The plea of a partial failure lies under the Act of 1836, as well in cases in which the failure consists of indefinite damages, as it does in cases in which the failure consists of definite damages.

Debt, in Carroll Superior Court. Tried before Judge Bull, June Term, 1855.

VOL. XIX-64

Robinson vs. Wilson.

This was an action on two promissory notes, amounting, together, to Five Thousand and Ninety Dollars, besides interest.

The pleas of defendant were, that the notes were given for a manufacturing establishment, including buildings, machinery, goods, &c.; that a portion of the goods and machinery sold had been removed and sold by plaintiff after the sale; and also, that the machinery was represented to him, by plaintiff, to be new and good, and of the most improved kind; whereas, it was old and worn out, and nearly worthless.

The plaintiff, at the trial term, moved to strike out these pleas—

1st. Because not filed at the first term.

2d. Because the consideration of the notes being, in part, land, a total failure of consideration could not be plead; therefore, under our Statutes, a partial failure could not be plead. There was another plea, that the consideration had totally failed, without stating what the consideration was.

The Court ordered all of these pleas to be stricken out; whereupon, the defendant moved to amend his pleas, by stating that the purchase of the land and the machinery, were distinct contracts, though included in the same notes; that \$3.500 was for machinery, and the rest for land. The Court refused the amendment, and both these decisions are alleged as error.

E. Y. HILL; B. H. HILL; BUCHANAN, for plaintiff in error.

OLIVER; MABERRY; BLECKLEY, for defendant.

By the Court.—Benning, J. delivering the opinion.

First. Was the Court right in striking out the pleas of a partial failure of consideration?

The grounds on which the Court went, seem to have been two: first, that the pleas had not been filed at the first

Robinson ve. Wilson.

term; secondly, that as the consideration of the notes was, in part, land, the case was such as not to admit of the plea of a total failure of consideration; and therefore, in the opinion of the Court, was such as not to admit of the plea of a partial failure of consideration, the Court seeming to think that unless a case is such as to admit of the plea of a total failure of consideration, it is not such as to admit of the plea of a partial failure of consideration.

Was this last ground good? The Statute of 1836, as to pleading a partial failure of consideration, declares, that defendants may plead a partial failure of consideration: "Provided, that such plea of partial failure shall only be pleaded in such cases, under such circumstances, and between such parties as would now admit and allow the plea of total failure of consideration. And provided further, that the plea contemplated by this Act shall be fully and specially pleaded at the first term of the Court to which the action may be returnable, and not at any time thereafter, either at Common Law or on the appeal."

Now if this means that the plea of a partial failure, is to be pleaded only in cases in which a total failure may be pleaded, it is absurd and useless. In no case in which the plea of total failure can be pleaded, can there be any need of a plea of a partial failure. The plea of total failure, of necessity, must cover all that the plea of partial failure can cover, and more too.

But a Statute ought, if possible, to be so construed that it shall have some effect.

And this Statute will admit of a construction that will cause it to have a very good effect; the construction, indeed, which it has almost uniformly received.

[1.] And that construction is this: that whenever the case is such, that by the old law, the plea of a total failure might be pleaded to it, if the facts that exist for a plea make out a total failure, it is such, that by the Statute a plea of a partial failure may be pleaded to it, if the facts that exist for a plea make out no more than a partial failure.

Robinson vs. Wilson.

This is the construction which was sanctioned by this Court in Simmons vs. Blackman, (16 Ga. R. 318.) And if what is contrary to this view in Knight vs. Killett, (9 Ga. R. 582,) was ever anything wore than an obiter dictum, it is to be considered as over-ruled by the decision in that case.

As to the other ground for striking out these pleas, namely: that they had not been filed at the first term, we think it insufficient, in the face of the Amendment Act of 1854.

[2.] That Act declares, that "plaintiffs and defendants" "may, in any stage of the cause, as matter of right, amend their pleadings in all respects, whether in matter of form or matter of substance." This language covers the case of a plea of partial failure, as much as it does that of a plea of total failure, or that of a plea of any other matter in bar. And there is nothing in the nature of a plea of partial failure, that ought to put it, alone of all pleas, beyond the operation of the Act.

We think, then, that the Court erred in striking out the pleas of a partial failure of consideration.

It seems that the plea of a total failure of consideration, was struck out on the ground, that the consideration being in part land, the plea could not be true in fact. But the plea does not disclose the fact that the consideration was in part land. The plea says the consideration had totally failed, but it omits to say what the consideration was.

This plea may be bad for being too general; but it is not bad for being a plea of the total failure of a consideration, consisting partly in land. It is, in fact, no such plea.

And this is all we have to say of this plea.

What the defendant offered to add to his pleas, amounted, as we think, to no more than a partial failure of consideration; therefore, if what has been before said, as to the plea of a partial failure, is true, he was entitled to make the addition. We think he was entitled to make it.

It was argued for the defendant in error, that anything which consists in "unliquidated" damages, cannot be the subject of

Johnson and Wife ee. Wright and another.

a plea of a partial failure of consideration, but must be demanded, if at all, by suit.

[3.] The Statute, however, makes no such distinction. Its language is, that "whenever any action or actions shall be commenced at Common Law, founded upon any contract or contracts, it shall and may be lawful" to plead the plea of a partial failure. "Any contract or contracts" is an expression which includes, as well contracts in respect to which the partial failure is unliquidated—is indefinite, as those in which it is definite.

And there is really no more reason for driving a man to his action in the case in which his damages are indefinite, than there is in driving him to his action in the case in which his damages are definite. The trial in either case, may be as well on a plea as on a declaration.

No. 92.—Jefferson Johnson and Wife, plaintiffs in error, vs. A. R. Wright and Another, defendants.

[1.] In ejectment, the plaintiff insisted that a judgment which would bar him, was obtained by fraud—fraud consisting mainly in the procurement of the judgment in the absence of a guardian ad litem, for the defendant in the judgment, a minor. The parties agreed to submit the question of fraud to a Jury, as it would have been submitted had the case been in Equity. On the trial, the Court, at the instance of the defendant, made a judgment muce pro tune, appointing a certain person guardian ad litem: Held, that this was an error in the Court.

Ejectment, in Cass Superior Court. Decided by Judge TRIPPE, September Term, 1856.

The facts of this case are as follows:

.An orphan, named Harriet Taff, was a drawer of a lot of

Johnson and Wife es. Wright and another.

land in 1830. A scire facias was sued out in 1833, to declare said draw fraudulent; and a judgment was had condemning the draw, and the land was sold; under which sale the defendants claim.

Johnson, the plaintiff, having inter-married with Harriet Taff, brought this action of ejectment against the tenants of said land. It was agreed between the parties, that the Jury should try the case as if a bill in Equity had been filed, to set aside said judgment on the scire facias, as being obtained by fraud, and on the ground that Harriet Taff, at the time of the rendition of such judgment, had no guardian or person appointed by the Court to defend said suit for her as required by the Act.

The cause was opened to the Jury, and the testimony of the plaintiffs had been submitted, when defendants moved the Court to take an order nunc pro tune, appointing John W. Taff guardian ad litem for Harriet Taff-this order to be entered as for March Term, 1834. In support of this motion they submitted to the Court an entry on the bench docket. in the scire facias case, as follows: "John W. Taff appointed guardian pendente lite." This entry John W. Hooper, former Judge of the Court, testified to be in his hand-writing; that he was then the Judge of the Superior Court of this Circuit, and made the entry; that a motion was made to appoint John W. Taff guardian, and it was granted. There was submitted, also, an entry on the original scire facias, admitted to be in the hand-writing of the then Clerk of the On this evidence, the Judge granted the motion to enter said order nunc pro tunc. To which decision plaintiffs excepted, on the grounds-

- 1st. That more than twenty years have elapsed since the alleged granting of the order now entered.
- 2d. That the testimony is not sufficient to warrant the order.
- 3d. That by the agreement between the parties, the question was submitted to the Jury, whether such appointment was actually made or not.

Johnson and Wife-es. Wright and another.

AKIN; HULL, for plaintiffs in error.

UNDERWOOD, for defendants.

By the Court.—BENNING, J. delivering the opinion.

The question is, whether it was right in the Court, under the circumstances of this case, to interpose and render the judgment nunc pro tune?

It seems that there was a question in the case, whether the judgment in sci. fa. had been obtained by fraud or not; and that the main question involved in this question was, whether a guardian or other person, ad litem, had ever been appointed or not in the sci. fa.?

And it seems that the parties agreed that the question of fraud or no fraud in the judgment, should be submitted to the Jury just as it would have been if the parties resisting the judgment had filed a bill alleging the fraud, and that bill had been before the Jury.

Whether a judgment was procured by fraud, is a proper question for a Court of Equity. And such a question, if presented to a Court of Equity, would be presented by a bill, and would be a question for a Jury.

Johnson and wife, then, had the right to present the question, whether the jndgment in the scire facias was obtained by fraud or not to a Court of Equity; and by consequence, the right to have that question tried by a Jury. This was their right.

They agreed with the tenants in possession, that this question should not be presented to a Court of Equity, but should, in the course of the trial of the ejectment—a trial to which the question related, be presented to the Jury trying the ejectment, and should be tried by that Jury. Was this an illegal agreement, or an agreement not binding on the parties to it?

What law did it violate? We know of none.

Johnson and Wife vs. Wright and another.

It is every day's practice for a defendant to confess a judgment, reserving the right of appeal. It is, perhaps, quite as common for the parties to a case to agree that the case be put on the appeal, without the intervention of any verdict of a Petit Jury.

The substance of such agreements is, that the case shall not be tried by a Petit Jury at all, but shall be tried by a Special Jury on appeal, as if it had once been tried by a Petit Jury.

And what, in substance, is the other agreement? It is, that a question shall be tried by a Special Jury, in a proceeding at Law, rather than by a special Jury in a proceeding in Equity. This is all.

We cannot say, then, that we think that the agreement was illegal.

If legal, was it not binding on the parties to it? Johnson and wife had acted on the agreement. Instead of filing their bill, they had gone to trial relying on the stipulation that they might have on the trial all that they could have by a bill.

It is a general rule, that agreements made by parties in the progress of a case which have been acted on by either party, cannot be repudiated by the other; at least, not unless, on setting aside the agreements, things resume their position in statu quo.

We know of nothing to take the present agreement out of this general rule.

We think, therefore, that if the Court below had seen fit to let the tenants in the ejectment abandon the agreement with the lessors, the Court should at least have continued the case so as to give the lessors an opportunity to file a bill to set aside the judgment. The Court ought not, we think, to have gone further—to have gone the length of itself, conclusively deciding the very question the presentation of which would be the sole object of the bill. This the Court did when it made the judgment nunc pro tunc.

In this judgment, therefore, the Court, as we think, erred.

- No 93.—W. T. S. Adams, executor, plaintiff in error, vs. John Dixon, administrator, and others, defendants.
- [1.] To entitle a person to a bill of interpleader, he must claim no interest in the fund or property, claimed of him by persons, on whom he calls to interplead and have their rights adjudicated.
- [2.] An executor has such an interest in property which came to his hands, as executor, and for which he is sued by a person claiming it by title paramount to that of testator, as precludes him from calling on parties claiming under the will, to interplead with the plaintiff; he is bound to defend.
- [3.] In such case, the interposition of a Court of Equity, is not necessary to his protection. The judgment of a Court of Law, on the legal title, if against him, will protect him.
- [4.] A Court of Equity will not sustain such a bill as a bill for direction, in the marshalling of the assets of the testator. The duty of executor is clearand free from embarrassment.

In Equity, in Catoosa Superior Court. Decided by Judge TRIPPE, October Term, 1855.

This was a bill of interpleader, filed by Adams, as executor of Jonathan Fielding, deceased, setting forth, that in the will of said Fielding, certain negroes were specifically bequeathed to his widow and his three brothers, James, Henry and George Fennell Fielding; that complainant, as executor, had said slaves in possession, and that he has been sued in Trover for them, by John Dickson, as administrator of Elizabeth Fielding, a former wife of testator, who claims them under an anti-nuptial agreement, between said Jonathan and Elizabeth; which action is now pending.

The bill was filed against the said Dickson, and against the said specific legatees, praying that they might interplead and have their respective claims to said negroes passed upon by the Court, to the end, that the complainant, as executor, might be protected against litigation and possible loss.

Upon demurrer, the Court dismissed this bill, upon the

Adams, ex'r, vs. Dixon, adm'r, et al.

ground, that no sufficient ground was shown for the interposition of a Court of Equity.

And on this decision error is assigned.

W. G. HANSELL & ALEXANDER, for plaintiff in error.

UNDERWOOD and HULL, representing AKIN, for defendants.

By the Court.—McDonald, J. delivering the opinion.

Complainant's testator, amongst other things, bequeathed to his wife and three brothers all his negroes, to be equally divided among them. After the probate of the will, and thequalification of complainant as executor, he was sued, in an action of trover, by John Dickson, as administrator of Elizabeth Fielding, deceased, a former wife of the testator, for all the negroes embraced in the will, claiming them under antenuptial marriage articles as the property of his intestate. The legatees claim the property under the will.

The complainant files his bill, alleging that he claims no individual interest in and to the said slaves or their hire; that he holds them and their hire as executor of the last will and testament of Jonathan Fielding, deceased, and that he cannot surrender the said slaves to either of the parties without great risk, trouble and expense; and, until they appear before the Court and interplead with each other, and a final order and decree of the Court shall be had for his protection; and he prays that the said parties may interplead, and settle, and adjust their right and title to said negro slaves and their hire. The bill is entitled a bill of interpleader; but it contains an additional prayer, that the Court would secure and protect him from injury and loss, by giving him the benefit of its direction, order and decree, in the marshalling of the as-The bill was demurred to; the demurrer sets of the estate. was sustained and the bill dismissed, and the decision of the Court is excepted to.

Adams, ex'r, vs. Dixon, adm'r, et al.

The case made by this bill is simply this: The complainant is sued for slaves which came to his possession as executor, by a party who claims title to them in opposition to the title of testator; and the other parties called on to interplead, claim the same property as legatees under the testator's will, and claim his title. Is this a case in which the executor may file a bill of interpleader?

[1.] To entitle a person to a bill of interpleader, he must be in a position in which he is liable to one of two or more persons, who claim from him the same debt or duty; and he claims no right in opposition to the claimants or either of them; and he does not know to whom he ought, of right, to render the debt or duty.

In such case, he may generally call on the parties to interplead, that the Court may judge between them, and he be protected. He must be a party entirely indifferent between them.

The amount of the fund or matter in the hands of complainant, upon which hostile claims are alleged to have been made, must be taken to be as stated by the complainant, and cannot be controverted by the answers, for the purpose of having it adjudicated upon. Atkinson vs. Manks, (1 Cowen's R. 704.)

[2.] The complainant, as executor, owes no debt or duty to Dickson, administrator of Elizabeth Fielding; he is not without interest in the suit instituted by Dickson as administrator; he is the proper person to defend the action, and he is bound to do it. He cannot, by a bill of interpleader, call on legatees, whose interest it is his duty to protect, to assume the burdens of litigation which his office of executor imposes on him. For certain purposes, the title of the property is in him.

If necessary, he may sell the property for the payment of debts or making distribution. His liability may be different in amount to the parties on whom he calls to interplead. If Dickson makes good his title, he may recover the slaves and

Adams, ex'r, vs. Dixon, adm'r, et al.

the value of the hire; to the legatees he is liable for the hire only that he received, if he was guilty of fraud or negligence.

[3.] The interposition of a Court of Chancery, is not necessary to the ample protection of the complainant. commits no devastavit by making a faithless or merely colorable defence to the action at Law, and the property should be recovered from him, the judgment recovered on title paramount to testator's title, will protect him. The pendency of the action for the property, will be sufficient to suspend any suit that the legatees may institute against him. suit is upon the legal title, and the complainant must defend himself as well as he can at Law. In a case of this sort, the Court will not assume the right to try the legal title. (Story's Equity Ju. sect. 820.) To sustain this bill, would be to protract the litigation between the parties, transfer from a Court of Law, the appropriate jurisdiction, to a Court of Chancery, the trial of a mere legal title, and add to the expenses of the parties, without giving the complainant a surer protection than a judgment at Law would afford him.

[4.] The bill prays the direction of the Court in the marshalling the assets of the testator, and asks the decree of the Court for complainant's protection. Such bills have been sustained, both in England and in this State, but only in cases where, from the complication of the affairs of the testator, the administering the estate would be unsafe.

Such is not the case here. There is no difficulty presented in the bill before us, that ought to embarrass the executor. Certain slaves which came to his possession as executor, are claimed by title paramount to that of the testator, and suit has been instituted against him for their recovery. If they are recovered from him after a fair and faithful defence, the legatees can have no claim for them; if they are not recovered, the duty of executor is plain, and there can be no difficulty in delivering them to the legatees under the directions of the will.

Judgment below affirmed.

Worthy w. Lowry.

No. 94.—WILLIAM WORTHY, plaintiff in error, vs. WILLIAM LOWRY, defendant.

[1.] On the 25th December, 1841, judgment was obtained in the Justice's Court; January 5th, 1842, an execution issued, on which were these entries: "nulla bona" by the Constable, 7th February, 1842; fi. fa. returned and ca. sa. issued by the Magistrate 31st January, 1849; levy on land by the Constable, July 28th, 1849. It was admitted that a short time before the last entry, the officer went to arrest the defendant under the capias, who pointed out the land; whereupon, the ca. sa. was returned and the f. fa. re-issued: Held, that the judgment was not void under the Act of 1823.

Claim, in Whitfield Superior Court. Tried before Judge TRIPPE, October Term, 1855.

This case arose from a levy on land of a Justice's Court f.

fa. against one Carpenter, and a claim by Worthy.

Plaintiff in execution introduced the fi. fa. founded on a judgment of the 25th of December, 1841, and issued January 5th, 1842; on which were the following entries: a return of sulla bona, made by a Constable February 7th, 1842; an entry by the Justice of the Peace, of "fi. fa. returned, and ca. sa. issued," dated January 31st, 1849. The ca. sa. was produced, and had no entry on it; but it was shown, that a short time before the present levy, the Constable had gone to arrest the defendant, who had pointed out this lot of land; upon which, the ca. sa. was returned, the fi. fa. re-issued, and levied on the land now in dispute, July 28th, 1849, which levy was on the fi. fa.

Claimant objected to this fi. fa. as void under the "Dormant Judgment Act;" which objection was over-ruled by the Court; and this decision is assigned as error.

AKIN, for plaintiff in error.

WALKER, for defendant.

Worthy vs. Lowry.

By the Court.—LUMPKIN, J. delivering the opinion.

[1.] Was the judgment in this case dormant?

The Court below decided that it was not; and we think, decided right.

This case is not distinguishable from that of Strawbridge vs. Mann et al. (17 Ga. R. 454.) The facts upon which that case went, were briefly these: That the ca. sa. had been preceded by a fi. fa. which issued within seven years, and on which there was an entry of nulla bona, within seven years from the date of the judgment; that the date of the ca. sa. was within seven years from the date of the judgment, and that the arrest took place within seven years from the date of the ca. sa.

It is true, that in the case before us, there was no arrest of the defendant on the ca. sa. within seven years from its date. But there is that which is equivalent to it; when the officer went to make the arrest, the land, which is the subject of this dispute, was pointed out by the defendant, and a levy was made on the land by the fi. fa.; and all this within seven years of the date of the ca. sa. Indeed it lacked but a few months of being within seven years of the date of the judgment.

So much, then, for the identity between the two cases. But the case before us has a feature which was wanting in the other, namely: the indorsement on the fi. fa. by the Justice of the Peace, that the fi. fa. had been returned, and that a ca. sa. had issued. And this entry was made within seven years from the date of the fi. fa.

And which, we would respectfully ask, is best calculated to give notice to creditors and purchasers, that a judgment is open and operative, a credit of five dollars made by the Sheriff or Constable on the execution, and the paper immediately replaced in the pocket or secretary of the plaintiff, or this entry by the Magistrate on this precept?

But Counsel contend that the words of the Act must be

Worthy ... Lowry.

literally complied with. Very well—if the rule of literal interpretation is to be applied, there was a return of "no property" on the f. fa. by the Constable, within seven years from the date of the judgment. And this fully satisfies the words of the Statute. But it is replied, that this Court has already decided, that the Equity of the Statute requires that this entry should be repeated every seven years. This is true, and this Court has also held, in Strawbridge and Mann, that just such a case as this does not come within the mischief intended to be provided against by the Dormant Judgment Act. In other words, that by an equitable construction of the law, this case should be excluded.

We must be consistent with ourselves, at least; we must adopt and adhere to one mode of construction or the other-Thus far, right or wrong, we have been uniform in putting an equitable construction upon the Act of 1823. this principle, the past adjudications are all reconcilable. shall be pardoned, I trust, for saying, however, that with my political creed, being a State Right's man of the straightest sect, I never yielded more reluctantly to any judgment pronounced by this Court, than that of Booth vs. Williams,. (2 Kelly 253.) The convention of Judges, as early as 1832, in Stone against Head et. al. (Dudley, 166,) had ruled, that unless the entry was renewed every seven years, showing continuing vigilance on the part of the plaintiff or owner, that the judgment was void. And believing it to be the first duty of a Judge, as it is of every good citizen, to yield to authority, I surrendered my individual opinion, especially as the question involved was the construction of a Statute which had been acted upon so long. We may yet be driven, from the necessity of the case, to return to the plain and obvious language of the law. For myself, I believe its benefits greatly over-rated. Its only practical effect being, to operate very hard upon kind-hearted and careless creditors.

It is true, that the claimant in this case is probably a purchaser. But if so, the present levy was made within little more than seven years from the date of the judgment, and it

does not appear when his title accrued, if, indeed, he has any. It is probably within seven years from the date of the judgment. He is not, therefore, one of that class of purchasers intended to be favored by the Statute.

No. 95.—BAKER & HART, plaintiffs in error, vs. THOMAS T. NAPPIER and WIFE, defendants in error.

[1.] There were two firms, in one of which the members were Kilgrow & Price; in the other, Kilgrow & Patillo. A merchant sold to Kilgrow certain goods, and sought to hold the firm in which Price was a member, liable for the goods: Held, that he could do so, although Kilgrow might have intended the goods for the other firm, provided he really thought that Kilgrow was acting for the firm in which Price was a member, and the goods were suitable for that firm—the merchant having first used ordinary care, to find out which it was Kilgrow was acting for.

Assumpsit, in Whitfield Superior Court. Tried before Judge TRIPPE, October Term, 1855.

This was an action brought against Thomas T. Nappier and his wife, formerly Mrs. Price, on an open account for articles sold before her marriage, to her and one E. W. Kilgrow, with whom she was in partnership in keeping a hotel. The following is the testimony in the cause:

WILLIAM L. WHITMAN testified, that he was living in Dalton in 1849, and was a clerk in the store of Mr. Cunningham. E. W. Kilgrow & Mrs. Celia Price were in partnership in the hotel in that place. They purchased goods at the store of Mr. Cunningham for the hotel, and they were charged to E. W. Kilgrow & Co.; that he, witness, boarded at the hotel, and his board there, was paid by the account made at Mr. Cunningham's store, by E. W. Kilgrow & Co.; he never saw any brandy, candy or cider used at the hotel;

they did use such articles at the hotel, as contained in the account, except the three mentioned—brandy, eider and candy; these may have been used at the hotel, but he never saw them used; he never saw any soda biscuit used at the hotel.

Copy of the answers of Theodore D. Caswell, to interrogatories which were read in evidence on the trial:

That he knows the plaintiffs, but not the defendants; that he does know that the plaintiffs sold goods to E. W. Kilgrow & Co. in the year 1849. It was on the twenty-fifth of June. in that year, that the articles were sold, namely: one barrel of sugar, one bag rio coffee, & barrel of crush sugar, box adament. candles, one box candy, one barrel cider, one box tea, 1 barrel rice, one box soda biscuit, 2 dozen (gallons) pickles. 25 lb almonds, ten galls. fine brandy, one auction bell, which goods were shipped by the Georgia Rail Road to said E. W. Kilgrow & Co. at Dalton, Georgia; that he annexed to these interrogatories a true copy of the account for the goods so sold by plaintiffs to E. W. Kilgrow & Co. in 1849. (This account annexed is precisely the same as the account sued on.) Witness says that he has carefully examined said copy of account so annexed, and the correct prices of each article, as therein stated, and that the goods aforesaid were, at that time, well worth the prices severally attached to them in said copy account. Witness says that credit of six dollars and a half is to be allowed on said account, for board of plaintiffs in September of that year; that he hereto annexes the original receipts, showing said goods were sent to E. W. Kilgrow The annexed receipts (two in number) were signed by James Simmons, who was, at that time, the receiving clerk of the Georgia Rail Road & Banking Company at Augusta, Witness says he knows said Simmons signed said receipts, because said Simmons personally, after annexing said receipts, acknowledged that fact to witness. knows no more in favor of plaintiff, except that no part of said account has been paid; nor is there any other credit

that witness knows of, except the items for board abovenamed, which ought to be allowed against said account.

The two receipts named and referred to in the foregoingtestimony, were given by Georgia Rail Road agent to Baker & Hart, for the articles sued for, and dated June 25th, 1849, showing that the goods were marked E. W. Kilgrow & Co. Dalton, and signed Simmons, agent.

The answer of William Gordon to interrogatories which were read in evidence on the trial: That he knows James B. Hart, one of the plaintiffs, and the defendants; I presented a copy of the annexed account to Mrs. Celia Price. now Mrs. Celia Nappier, on or about the first day of September, 1849, in Dalton, the place where she then lived, and she referred me to Elias W. Kilgrow, her partner in the hotel, for settlement; and he, Kilgrow, stated that the account was just and true, and that it was for articles furnished by the plaintiffs for himself and Mrs. Price, now Mrs. Nappier, in keeping said Hotel. The firm name of Mrs. Celia Price, now Mrs. Celia Nappier, & E. W. Kilgrow, in keeping the hotel, was, I think, Mrs. Celia Price & E. W. Kilgrow; I think that was their firm name, or their sign board; but they purchased articles, at times, that were charged to E. W. Kilgrow & Co. and paid for them; they were engaged in keeping hotel in Dalton in said State; the partnership was dissolved in the latter part of the year 1849, by the intermarriage of Mrs. Celia Price with Thomas T. Nappier, which marriage took place in the latter part of the year 1849. why I presented the account to her was, when I went to have the account settled, she was the first I saw in the house, Kilgrow not being in the house at the time. I stated to her that it was an account against her and Mr. Kilgrow; I did not read over the items in said account to her; she neither stated that it was just or unjust, true or false, but simply referred me to E. W. Kilgrow for its settlement. a co-partner in a grocery in Dalton, with a man by the name of Patillo; I do not know that the items in the annexed account were purchased for the grocery; but on the contrary,

Kilgrow informed me that they were purchased for the use of the hotel, in which Mrs. Price, now Mrs. Nappier, and Kilgrow were concerned; Kilgrow and Celia Price had a sign up; I think the names upon the said sign was Mrs. Celia Price and E. W. Kilgrow or E. W. Kilgrow and Mrs. Celia I never heard Mrs. Celia Price say that she was a partner of E. W. Kilgrow & Co. or E. W. Kilgrow and Celia Price; I don't think I ever spoke a dozen words to her in my life. He answers, the firm name of Kilgrow and Patillo was, I think, E. W. Kilgrow & Co. The reason why I did not present said account to E. W. Kilgrow & Co. was this: I was informed by E. W. Kilgrow, one of the defendants, that the articles in the annexed account were furnished for and made use of by E. W. Kilgrow and Mrs. Celia Price, or Mrs. Celia Price and E. W. Kilgrow. She married shortly after I presented said account, or shortly after it was thought, by a good many, that they (Thomas T. Nappier and Mrs. Price) would marry; and they did marry soon after. not think that plaintiffs had any idea that she was going to marry Thomas T. Nappier or any other person, at the time they sent the account up for settlement. (The account referred to in the testimony of William Gordon, as presented to Mrs. Price and E. W. Kilgrow, and acknowldged to be just by him, is the same account sued on.)

The answer of WILLIAM L. HIGH to interrogatories read in evidence on the trial of the cause: He knows the parties in the cause; the plaintiff sent him two accounts, one on Kilgrow & Co. and one on Kilgrow & Patillo. The precise amount of said accounts he does not recollect; but he has a receipt on William Gordon, Esq. who settled the account by note; and his receipt shows a note against Kilgrow & Co. for \$137 55. Mrs. Price told him that she was one of the firm of Kilgrow & Co. and give him a horse of her individual property to indemnify him against loss by the firm, upon whom witness had a debt; he gave the accounts, both the accounts on Kilgrow & Patillo, and the account against Kilgrow & Co. to William Gordon, Esq.; does not know precisely upon

whose credit the account was made; thinks it was made upon the credit of E. W. Kilgrow and Mrs. Price, who compose the firm; thinks he received the account about the first of September, 1849; he does not think he called upon any body to settle said account before he gave the same to Gordon. Plaintiffs sent the accounts to witness by mail; has not got the letter before him, and does not know what he said.

COPY NOTE READ IN EVIDENCE.

\$137 55.

ŧ,

Dalton, Sept. 1st, 1849.

One month after date, we promise, or either of us, to pay Baker & Hart, or bearer, One Hundred and Thirty-seven $^{4.5}_{10.0}$ Dollars, for value received.

E. W. KILGROW, C. PRICE.

It was shown by the record, that an action had been instituted against Nappier and wife, on the note which had been given for the account, (a joint and several note of E. W. Kilgrow and Celia Price,) to which Mrs. Nappier had entered a plea of non est factum, and the action was dismissed.

The testimony being closed, Counsel for plaintiffs requested the Court to charge, "That if Mrs. Price, (now Mrs. Nappier,) was in partnership with E. W. Kilgrow and used the firm name of E. W. Kilgrow & Co. and the goods were bought in their firm name, by either of the firm, the firm are liable, it matters not how or for what purpose the goods were bought and used."

This charge the Court refused to give as requested, but charged, "That if Mrs. Price, now Mrs. Nappier, was in partnership with E. W. Kilgrow, and used the firm name of E. W. Kilgrow & Co. and the goods were bought in the firm name by either of the firm, for them, the firm are liable, it matters not for what purpose the goods were bought and used." The Court further charged the Jury, that they must be satisfied, from the evidence, that E. W. Kilgrow and Mrs. Price-were not only in partnership in the hotel, but in partnership in this transaction; that if the goods were purchased

for the grocery of Kilgrow & Patillo, or any other firm, Mrs. Nappier is not liable.

The Jury found for defendant, and plaintiffs moved for a new trial, on the ground that the verdict was contrary to the evidence; and on the further grounds, of error in the Court in the refusal to charge as requested, and in the charges given as above.

The motion for a new trial was refused, and this decision is assigned as error.

AKIN; HULL, for plaintiffs in error.

UNDERWOOD, for defendants.

By the Court.—BENNING, J. delivering the opinion.

[1.] It appears that there were two partnerships, one of which was engaged in the "hotel business," and was composed of Kilgrow and Mrs. Price; the other of which was engaged in the "grocery business," and was composed of Kilgrow & Patillo. It is somewhat doubtful whether either partnership had a well settled firm name, or whether each did not sometimes use or recognize the name of E. W. Kilgrow & Co. as its own.

The charge of the Court amounted to this: that unless it was the intention of the purchaser of the goods, (Kilgrow,) that the purchase should be for that firm of which Mrs. Price was a member, Mrs. Price was not bound to pay for them. The charge does not take into the account the question, which partnership it was to which the sellers intended the sale to be. And yet, that, perhaps, was the most important question of all.

If the sellers of the goods really thought, when selling them, that they were selling them, not to the firm in which Patillo was a member, but to that in which Mrs. Price was a member, then Mrs. Price was bound to pay for the goods, provided they were such as were suitable to the business of

the partnership in which she was a member, even although Kilgrow, the partner, to whom they may have been sold, intended the goods for the other partnership, and the other partnership obtained them, unless the sellers knew, or might by the use of ordinary care have known, that this was the intention of Kilgrow.

One partner has the power to bind the partnership, in things within the scope of the partnership; and "where one of two innocent persons must suffer by the act of a third person, he shall suffer who has been the cause or occasion of the confidence and credit reposed in such third person." (Sto. on Part. §168.)

But a merchant, in dealing with a person known to him to be a member of two different firms, and in respect to goods suitable to either firm, would, in general, be in the exercise of no more than ordinary care, if he called on that person to know which was the firm he was dealing for. And if, without making any such inquiry, the merchant should sell the person the goods, thinking him to be acting for one firm when he was acting for the other, the merchant could, in general, hold only the firm for which the person was really acting liable.

This is said, of course, on the assumption that the person says or does nothing calculated to make the merchant believe him to be acting for the firm for which he, in reality, is not acting.

The charge of the Court, therefore, we think lacked fulness. We think it should have been this: that if Baker & Hart, after taking reasonable care to find out which firm Kilgrow was dealing for, really thought he was dealing for that in which Mrs. Price was a member, and so sold him the goods, intending them for that firm; and if the goods were adapted to the business of that firm, then that firm was liable to pay for the goods, although Kilgrow, in truth, intended them for the other firm, and although they went into the other firm.

Morris ve. Bradford and Walker.

No. 96.—James Morris, plaintiff in error, vs. S. M. Brad-FORD and G. Walker, defendants.

- [1.] To leave a copy of a bill in Chancery at the residence of the defendant, is a sufficient service, and also prima facie of an injunction; but in a proceeding against defendant, for a contempt, he may purge himself of it, by a sworn denial of notice of the injunction.
- [2.] A plaintiff in f. fa. or his assignee, purchasing land under such fi. fa. the same having been enjoined, and there being a decree of a Court of Chancery, to which the plaintiff was a party, postponing it to other charges against the land, acquires no title by said purchase.

Ejectment, in Whitfield Superior Court. Tried before Judge TRIPPE, April Term, 1855.

This was an action brought by Bradford & Walker against Morris, to recover possession of lot No. 97, 13th dist. 3d sec. of said county. The land in dispute had been the property of Thos. Glascock, late of Richmond Co. The plaintiff, after showing the grant to Glascock, produced a deed to themselves, made by John Milledge as receiver of said estate, in pursuance of sale made under the authority of the Court of Equity of said county. Deed dated Oct. 5th, 1847. plaintiffs then introduced the record from Richmond Superior Court, of a bill filed by certain parties, distributees of a certain estate, of which Glascock had been administrator, alleging that Glascock had funds of theirs in his hands; that there were in existence several judgments against him, and they prayed an injunction against said judgment creditors from enforcing their executions, and claimed that the estate of Glascock should be applied to pay off their demand, in preference to others.

To this bill Geo. W. Crawford, among others, was made a

Morris ps. Bradford and Walker.

party defendant as a judgment creditor, and the following is the entry of service as to him:

"Left a copy of the within bill of injunction at the residence of George W. Crawford, one of the defendants, this day, December 11th, 1841.

WILLIAM V. KEE, Sheriff R. C."

There was no answer of Crawford to the bill. The following is the decree in the cause:

Now at this term, 1844, comes the parties in interest before His Honor, JOHN SCHLEY, Judge; also comes the Jury, Eugene Verderey, Edward Averd, Thomas Wylds, Abner-Read, Andrew G. Bull, George Robertson, George B. Carhart, George M. Newton, John D. Crane, Robert A. Reid, Isaiah Pense, John J. Cohen, who, upon their oath do say: In this case, the Jury find that there is due to the representatives of Priscilla Jones the following amounts, to-wit: tothe administrator of Isham Jones Seven Hundred and Twenty Dollars Fifty-two Cents, to John Pond, executor of Milley McGinley, Seven Hundred and Twenty Dollars Fifty-two-Cents, and to Fureby Griffin Seven Hundred and Twenty Dollars Fifty-two Cents; and that there is due to James Beard Two Hundred Ninety-two Dollars, and to Samuel Young the sum of Eleven Hundred and Sixty-eight Dollars. which amounts are to be made pro rata from such assets of the defendant's estate as may be found, by the Master in Chancery, to be in the hands of said administrator, or may hereafter come to his hands, to be administered in preference to the claims of other persons.

ANDREW G. BULL, Foreman.

The following is the order appointing a receiver:

Morris vs. Bradford and Walker.

The defendant, Andrew McLean, having been, by the Court of Ordinary of Richmond County, removed from the administration of the estate of said Thomas Glascock; since the rendition of the verdict in said cases, and no other person applying for administration; and it being necessary that some person should be appointed to receive and to dispose of said estate: It is ordered, that William W. Holt be, and he is hereby appointed, receiver, with full power to sell and dispose of said estate, or any part thereof, wheresoever the same may be; and as such receiver, to give and to execute all necessary titles to the purchasers, retaining out of the proceeds his travelling and other expenses, and such commission as may hereafter be determined on by the Court. It is further ordered, that said receiver sell and dispose of said property. at such times, publicly or privately, and upon such terms, as he may think best; and that he report at each term of this Court hereafter, his proceedings in the premises. ther ordered, that the accounts of said administrator be referred to the Master in Equity, and that he report thereon at the next term of this Court.

Subsequently, John Milledge was appointed instead of Judge Holt.

It was admitted that James Morris, in the latter part of the year 1845, purchased and took a written assignment from George W. Crawford, a *fieri facias*, that issued from the Inferior Court of Richmond County, the same *fi. fa.* referred to in the bill; and that in the year 1847, he, James Morris,

VOL XIX-67

Morrie ve. Bradford and Walker.

directed the Sheriff of, then Murray County, to levy on the lot of land in dispute; and that the Sheriff of the said Murray County sold the land on the first Tuesday in August, 1847, under said fi: fa. and James Morris became the purchaser. It was not pretended that James Morris had actual notice of the bill filed in Richmond County, or of the decree made in the case when he purchased the execution and bought the land.

Here the cause closed on both sides. Counsel for the defendant requested the Court to charge the Jury—

1st. That if George W. Crawford was not personally served with a copy of the bill and injunction—a copy being left at his house being insufficient service—he is not bound by the injunction unless he had personal notice of it; and a sale by the Sheriff to Morris, under the execution in Crawford's favor, is legal and valid.

2d. That if Crawford was served with a copy of the bill and injunction, the doctrine of *lis pendens* does not apply; and the sale of the lot of land to Morris by the Sheriff, under the execution in favor of Crawford, is valid, if the lot of land was not in dispute in the bill in Richmond County.

2d. That if Morris purchased the lot of land under the execution in favor of Crawford, after a decree rendered in the bill in Richmond, and without notice of the injunction or decree, his title acquired at Sheriff's sale, is not affected by the injunction and decree in the case in Richmond; and if the execution was obtained before filing of the bill, Morris has the better title.

4th. That if Morris was an innocent purchaser of the land at Sheriff's sale, without actual notice of the suit in Richmond and the decree made, he has a good title to the land.

All of which charges the Court refused to give as requested, but charged the Jury, that in this State, according to law and practice of the Courts, service of a bill in Equity, by leaving a copy at defendant's most notorious place of abode, was sufficient service for all purposes, as to him, and that Crawford was bound by the injunction.

Morris vs. Bradford and Walker.

That the doctrine of *lis pendens* could have no application to Crawford in this case, he being a party to the bill of injunction, and served with it; and that *lie pendens* was constructive notice only to strangers to the bill; and that Crawford had actual notice by service on him.

That the bill in Equity in Richmond Superior Court, having enjoined the fi. fa. in favor of Crawford against Glascock, under which the premises in dispute were sold to Morris, and the bill taking the administration of the estate of Glascock out of the hands of his administrator, and disposing of the proceeds of said estate according to the equities claimed by the plaintiffs in said bill, it was a violation of said injunction for Crawford to proceed to sell said land under said fi. fa.; and so far as he was concerned, said sale was void and conveyed no title; and that Morris being the assignee of said fi. fa. was put in the place and stead of Crawford, and subject to the effect of the notice given Crawford by the bill served on him; and if, under these circumstances, Morris became the purchaser of said land at the Sheriff's sale, he was no more an innocent purchaser than Crawford would have been had he been the purchaser. That if, under these circumstances, the sale by the Sheriff of this lot of land was made and Morris became the purchaser, his deed from the Sheriff will be postponed in favor of the deed made under the decree of the Court of Equity of Richmond County.

To which charge as well as refusal to charge, as requested by defendant's Counsel, Counsel for defendant excepted.

The Jury returned a verdict for the plaintiffs for the premises in dispute, with cost of suit; and Counsel for defendant excepts and says:

First. That the Court erred in refusing to charge the Jury as requested by Counsel for defendant.

Second. That the Court erred in charging the Jury as he did charge them, and as is herein stated.

Morris es. Bradford and Walker.

AKIN; HULL, for plaintiff in error.

WALKER, for defendants in error.

By the Court.-McDonald, J. delivering the opinion.

The refusal of the Court to charge the Jury as requested by defendant's Counsel, and the charge of the Court to the Jury as given by him, are excepted to by said Counsel, and constitute the errors alleged against the decision of the Circuit Judge.

The first request raises the questions, of the sufficiency of the service of the bill and injunction on the defendant, Crawford, his obligation to obey it without personal notice, and the legality and validity of the sale made by the Sheriff to Morris, under the execution in favor of Crawford against Glascock.

[1.] The bill was served by leaving a copy "at the residence of George W. Crawford." The Statute declares, that a copy of the bill shall be served on the "opposite party," but does not prescribe the mode of service. (Cobb's New Dig. 467.) When the defendant resides out of the State, bills of injunction may be served on his Attorney or by pubication. (Cobb, 524.) The service of the bill, as an original bill in Equity, without an injunction, was unquestionably suf-Was the service of the injunction such as to give it effect and to lay on the defendant an obligation to obey it? By a strongly controlling weight of authority, it was sufficient; and for the breach of it he might have been proceeded against for contempt. It is probable, from what was stated in the argument, that he might have purged himself of the contempt, by a sworn denial of personal service or a notice of the injunction. But that is not the question here. cord shows that the parties in interest came before the Court. The defendant, Crawford, was a party in interest.

Morris vs. Bradford and Walker.

fact, (that the parties in interest came before the Court,) is stated in the decree of the Court, and the decree finds in favor of complainants, the amounts due them respectively; and it further finds, that they are to be paid from decedent's estate, in preference to the claims of other persons.

Whether the defendant, Crawford, had proper notice of the injunction or not, the service was sufficient to give force and effect to the decree against him. The decree was rendered in 1844. The execution was assigned to Morris in 1845. Morris stood in no better position than Crawford, in regard to the execution, and his power to enforce it. (Cobb, 499; 2 Kelly's R. 155.)

He, therefore, purchased under his own execution, with a decree of the Court of Chancery against him, postponing his judgment and execution to the claims for the satisfaction of which the receiver subsequently sold the land. He could acquire no title under such a purchase.

[2.] The Court very properly refused to charge the Jury as asked in the second request of defendant's Counsel. decree of the Court of Chancery of Richmond County was against Crawford, and postponed his execution debt, in common with the claims of all other creditors of Glascock, to the charges against his estate for the satisfaction of which the land in controversy was sold under the decree. bound the entire estate of deceased, and the title to the land sucd for was turned over to Holt, the receiver, by the dismissed administrator, as part of the assets of his estate. though Morris is the purchaser of the execution, the law places him in the position of his assignor, and he must be considered as purchasing, under his own enjoined execution, with a decree in Chancery against him postponing his execution to the claim under which the plaintiff in ejectment His title, under such a sale, is void. purchased the land. Roberts vs. Jackson, (1 Wend. R. 485.)

The exceptions to the charge of the Court to the Jury, and to the refusal of the Court to give in charge the third and fourth requests of the defendant's Counsel, must be over-

Edmondson, adm'r, es. White.

ruled for reasons already assigned. The judgment of the Court below is therefore affirmed.

No. 97.—James Edmondson, administrator, plaintiff in error, vs. William White, defendant.

[1.] When, in a proceeding under the Act "to amend the Rent Laws of this State," passed in 1827, the tenant swears that he is not the "tenant or lessee" of the plaintiff, it is necessary for the plaintiff to show a lease before he can recover.

Proceeding to dispossess a tenant, in Murray Superior Court. Tried before Judge TRIPPE, October Term, 1855.

James Edmondson, as administrator of William H. White, deceased, made affidavit in terms of the Statute, that William White was in possession as tenant, of a lot of land, the property of said intestate; that the term for which he had rented the same had expired, and that he refused to give possession. The Sheriff having served said White with process, he made an affidavit, that he was not the tenant of William H. White, deceased, or of his administrator; and the Sheriff returned the proceedings to the Superior Court.

On the trial, JAMES BUCHANAN testified: That William White was living on the land, and had frequently told witness that he held as tenant of William H. White.

JAMES BLACKWELL testified: That William White had purchased the land from one Matthew Young, and had lived on it ever since; that sometime after defendant made said purchase, he heard him say, that if William H. White had got the land he was glad of it, for he knew he would never turn him, defendant, off.

The Court charged the Jury, that the affidavit of defendant,

Edmondson, adm'r, se. White.

that he was no tenant, put plaintiff upon proof other than his own affidavit, of all the prerequisites of the Statute, except notice to quit; and that the plaintiff was put upon proof of the contract for rent, when made, for what term, and at what rent.

The Jury found for defendant; whereupon, plaintiff moved for a new trial, on the ground that the verdict was contrary to law and evidence, and on the ground of error of the Court in giving said charge; and also, on the ground of newly discovered evidence. In support of which he filed the affidavit of James Buchanan, the witness who had testified, stating that since the trial, upon reflection, he remembered the circumstances more distinctly, and he would now testify, that defendant told him that the Sheriff had formerly come to dispossess him at the instance of James Edmondson, who had bought the land at Sheriff's sale, as the property of Matthew Young, under whom he, defendant, had been holding; and that defendant agreed to hold as the tenant of Edmondson; and that after Edmondson sold the land to William H. White, defendant told witness he was holding under the said William H.; that in 1843, and at various other times, defendant had told him he was the tenant of William H. White.

The Court refused the new trial; and this decision is alleged as error.

SHEOPSHIRE; WALKER, for plaintiff in error.

AKIN; UNDERWOOD, for defendant.

By the Court.—Benning, J. delivering the opinion.

The Act of 1827 gives the landlord a remedy by which to recover possession, but gives it only in cases in which the "lease" has expired. He has to make oath that "the lease or term of time for which the land was rented, has expired." The Act was made for cases arising on the expiration of leases.

Edmondson, adm'r, vs. White.

Against the proceeding which may follow this affidavit, the tenant may defend himself by swearing that his lease "is not expired," or "that he does not hold either by lease or rent" from the plaintiff; and if he does so, the proceedings are to be returned to Court, and "the fact" is "to be there tried." (Cobb's Dig. 901.)

In the present case, the oath of the tenant was, that he was "not the lessee or tenant" of the plaintiff's intestate.

Such an oath being put in, what was the "fact" to be tried? Manifestly this: whether there was any lease or not. To show the tenant a lessee, it would have been necessary to show him a party to a lease—to show a lease.

And to show a lease, it is necessary to show with more or less of certainty the terms of the lease.

And this is no more than what the Court told the Jury, in the present case, it was necessary for the plaintiff to show.

We think, therefore, that the charge of the Court was not wrong.

Nor was the verdict contrary to the evidence. There was no evidence, whatever, of any lease.

And what was offered as newly discovered evidence, would not have shown any lease. In truth, however, that was merely cumulative.

We affirm the judgment of the Court below.

Earnest vs. Nappier and Wife.

- No. 98.—LAWBENCE W. EARNEST, plaintiff in error, vs. Thos. T. Nappier and Wife, defendants.
- [1.] A witness is competent if his interest, if he has any, is against the party calling him, more especially if his evidence is only corroborative of that already given by the opposite party.
- [2.] A mortgage debt should be credited with the value of property levied on by f. fa. issued on the foreclosure of mortgage, if the levy is not explained or accounted for.
- [3.] If the Jury render a verdict for a liquidated demand, they should give interest on it.
- [4.] The verdict of a Jury must be contrary to evidence; or, to the mind of the Court, against the weight of evidence, before the Court will interfere with the legitimate province of the Jury.

Action on note, in Catoosa Superior Court. Tried before Judge TRIPPR, October Term, 1855.

This was an action against Nappier and wife, by Earnest, on the following note:

By the 25th Dec. next, we promise to pay L. W. Earnest or bearer, Six Hundred Dollars, for value received, this 2d July, 1849.

E. W. KILGROW, CELIA PRICE.

Credited by \$118 82, raised from sale of mortgaged property, April 5, 1850. Also, by \$25 25, July 7, 1850. Both amounts paid by the Sheriff.

E. W. Kilgrow was a party to the action, but not served. The plaintiff having introduced the note sued on, closed his case.

Defendants then introduced a mortgage on a quantity of personal property, made by Kilgrow and Mrs. Price, to secure said note, of even date therewith. This mortgage had been foreclosed and execution issued, on which were many Earnest vs. Nappier and Wife.

lieved from the levy. His evidence, if given as proposed, could not have increased the verdict against the defendants, and was only corroborative of the proof already made by them.

If he had any interest in the case, however, it was against the party calling him; for if his property was subject to the incumbrance of the mortgage, it was his interest to diminish the mortgage debt; whereas, the object with which he was offered, was to increase it. He ought to have been admitted.

- [2.] The property seized on the mortgage f. fa. was, pro tanto, a satisfaction of the debt secured by the mortgage; and if not accounted for, its value ought to be allowed as a credit in this case. The charge of the Court was, therefore, correct on that point.
- [3.] The Jury ought to have given interest on the hundred dollars found by them. It is a liquidated demand, according to the settled meaning affixed to that term by this Court; and therefore, bears interest under the Statute. On that ground, the verdict of the Jury is contrary to law.

We are not prepared to say that the verdict of the Jury is contrary to evidence; or, strongly and decidedly against the weight of evidence.

Richard W. Jones, Esq. testified, that he had a conversation with the plaintiff and the defendant, Thomas T. Nappier, relative to the debt of the plaintiff against Kilgrow and Mrs. Price, now Mrs. Nappier. His impression is, that it was after the marriage, but he cannot say positively. He was consulted by Nappier, who wished to know if he was liable for the debt; and witness informed him that he was, or would be, not positive which. Plaintiff proposed to release him if he would pay one hundred dollars, giving as a reason that he could make his money out of the mortgaged property. Witness advised Nappier to do it, and thought, for reasons estated by him, that Nappier acceded to it, but is not positive. The plaintiff agreed, that if he got the money by the next sale day he would still release defendant. Plaintiff's proposition was to pay the hundred dollars then, as witness under-

Earnest vs. Nappier and Wife.

stood it. The conversation took place at the Union Hotel in Dalton, and William A. Camp was keeping the hotel at the time. He has no very distinct recollection of the words used at the time; thinks it took place some days before the sale; cannot say how many days; it was in the fall of 1849.

Certificate of marriage of Nappier with Mrs. Price, was introduced and proved, that they were married on the 9th day of September, 1849.

William A. Camp testified, that he took possession of the Union Hotel, at Dalton, on the 5th September, 1849; that the defendants were martied at his house and left immediately. He talked to Thomas T. Nappier about the debt of plaintiff, and advised him to arrange it, or have an understanding about it, before he was married; that he saw plaintiff and defendant, and Col. R. W. Jones, in conversation at the hotel a day or two after he took possession of it, and is certain it was before the marriage. He did not hear what they said. The defendant, Thomas T. Nappier, returned a week or two before the sale of the beds and furniture, and remained until after the sale, and witness kept the hotel some time after that.

[4.] The important question in regard to the evidence is, whether the agreement by Nappier to pay the hundred dollars, was antecedent or subsequent to his inter-marriage with Mrs. Price.

Jones testifies, that he had a conversation with the parties in relation to that debt. His impression is, it was after the marriage, but cannot say positively. This conversation was at the Union Hotel. Nappier wished to know if he was liable for the debt; Jones told him that he was or would be; he is not positive which. Here are two matters in reference to which Mr. Jones' mind doubts. Whether the conversation was before or after the marriage, and whether he informed him that he was liable or would be liable. If the marriage had then taken place, his information, undoubtedly, would have been, that he was liable; if it had not taken place, his advice would have been that he would be liable. Take Mr.

Earnest es. Nappier and Wife.

Camp's evidence in connection with Mr. Jones', and there can be but little doubt on the subject. Jones had a conversation with the parties, and Nappier wished to know if he was liable for the debt. From the reply of Jones, he may have desired to know if he would be liable. Why was this conversation held?

Camp had called Nappier's attention expressly to this debt, and advised him to arrange or have an understanding about it before the marriage. It is probable, therefore, that Nappier sought the interview for that purpose; and the probability is strengthened by the inquiry made of Jones. Jones had the conversation at the Union Hotel. Camp saw the parties in conversation at the Union Hotel. Jones is of the impression that the conversation was after the marriage, but is not positive; Camp is certain that the conversation in which he saw the parties engaged, was before the marriage.

Camp kept the Union Hotel, and took possession of it on 5th Sept. 1849. The marriage took place on the 9th of the same month. It took place at the Union Hotel, and the parties left immediately after the marriage.

We cannot say that the verdict of the Jury was either contrary to evidence, or strongly and decidedly against the weight of evidence. We sustain the decision of the Court on the second, fifth and sixth grounds taken on the motion for a new trial, and reverse the judgment of the Court on the other grounds.

Mason vs. Cooper, Supt.

No. 99.—Peter Mason, plaintiff in error. vs. James F. Cooper, Supt. W. & A. Rail Road, defendant.

[1.] The Act of 1851-'2 provides, that the superintendent of the Westera & Atlantic Rail Road shall have power, with the approval of the Governor, to settle all claims against the road; and should any dispute arise which cannot be amicably adjusted, the claimant shall be authorzed to bring suit in any of the Superior Courts of the several counties of the State through which the road passes, against the superintendent in his official character, &c.: Held, that the rejection of a claim by the late chief engineer, did not entitle the party to sue the superintendent under this Act.

Assumpsit, in Whitfield Superior Court. Tried before Judge TRIPPE, October Term, 1855.

In this case the only question was, whether, under the Act of 1852, for organizing the Western & Atlantlic Rail Road, an action against the superintendent can be maintained, without showing a previous attempt to settle the claim amicably with him. It was shown, that before the passage of the Act, an attempt had been made to settle with William L. Mitchell, the then chief engineer of the road.

The Court below held, that the action could not be maintained; and on this decision, error is assigned.

STANSELL, for plaintiff in error.

AKIN, for defendant.

By the Court.—LUMPKIN, J. delivering the opinion.

[1.] The only question in this case is, whether an attempt to settle with Mr. Mitchell, the late chief engineer of the State road, and a rejection of the plaintiff's demand by that officer, will entitle Mason to sue under the Act of 1851-'2?

The first section of this Act declares, that from and after its passage, the Western & Atlantic Rail Road shall be gov-

Mason ... Cooper, Supt.

erned, and its business conducted, according to the provisions of said Act, as thereinafter contained.

The second section makes it the duty of the Governor to appoint an officer, who shall be styled the superintendent of the road, and who shall give bond and security, in the sum of \$20.000, for the faithful discharge of his duties, and take an oath not to do any act, from fear, favor, reward or the hope thereof; but in all things to be governed solely by regard to the interest of the State. And amongst many other important functions committed to the superintendent, it is enacted, that he shall have power, with the approval of the Governor, to settle all claims against the road; "and should any dispute arise concerning any claim which cannot be amicably settled, the claimant shall be authorized to bring suits in any of the Superior Courts of the several counties of this State, through which the said road passes, against the superintendent, in his official character," &c. (Pamphlet Laws, 110, 111, 112.)

A citizen who seeks redress against the State, must abide by the law as it previously stood; or he must comply with the existing Act. But under the law as it stood before 1851-'2, he had no right to legal redress upon a claim like this, notwithstanding its rejection by the chief engineer. appeal to a Jury was only allowed in two cases: the killing of stock and the appropriation of land to the use of the road; whereas, under the present Statute, he may sue on any demand, provided a friendly adjustment cannot be made with The Act is, however, prospective in its the superintendent. operation; it confers a great boon upon the citizen. act of great condescension for the State to disrobe itself of its sovereignty and litigate, in its own Courts, with a private individual, upon terms of perfect equality. Surely the party. under such circumstances, should comply strictly with the terms of the Act. Suppose Mr. Mitchell, as engineer, did reject his account? Mr. Cooper, as superintendent, may determine to allow it. Congress passed an Act in 1797, to the effect, that in suits between the United States and indiRogers se. Bates.

viduals, no claim for a credit shall be admitted upon trial, but such as shall appear to have been presented to the accounting officers of the treasury for their examination, and by them disallowed, in whole or in part, &c. (4 Volume p. 423, §4.) The Federal Courts have uniformly required a strict compliance with this Statute, before they would permit an individual to avail himself of any credit against the public, however well founded the claim might be. (9 Cranch. 213.)

As to the suit, itself, being a substitute for an attempt to settle, amicably, the idea is preposterous. This provision is a condition precedent, which nothing can dispense with, inasmuch as the law itself makes no exceptions.

No. 100.—Spencer C. Rogers, plaintiff in error, vs. John C. Bates, defendant.

[1.] In attachment, a claim may be put in after judgment.

[2.] "Where both parties claim under the same third person, it is sufficient to prove the derivation of title from him, without proving his title."

Claim, in Whitfield Superior Court. Decided by Judge TRIPPE, April Term, 1856.

This was an attachment sued out by Rogers, against one Taylor, and levied on a lot of land August 30, 1851. In July, 1852, a judgment for plaintiff was had on this attachment, and an order taken to sell said land. In September, 1852, the land was claimed by Bates, who held under a deed from Taylor, dated September 4th, 1851.

The plaintiff moved to dismiss the claim on the ground

VOL XIX-69

Rogers vs. Bates.

that the claim had been interposed after judgment had been rendered in the attachment, and after an order had been made to sell the land. The Court over-ruled the motion, and plain-tiff excepted.

The claimant was introduced as a witness, who stated, that he claimed under said deed from Taylor, and by no other title; that he bought from Taylor, who lived in North Carolina.

It was proven, that on the day the attachment was levied,. the claimant had attempted to buy the land from one Mc-Clary, as the agent of Taylor.

Claimant then moved to dismiss the levy, on the ground that it was not shown that Taylor had either title or possession at the time of the levy.

The Court sustained the motion of claimant, and dismissed the levy; and on this decision, error is assigned; as, also, on the refusal of the Court to dismiss the claim.

WALKER, for plaintiff in error.

WRIGHT & SHROPSHIRB, for defendant.

By the Court.—Benning, J. delivering the opinion.

The plaintiff moved to dismiss the claim, on the ground that it had been put in after the rendition of the judgment in the attachment, and after the making of the order of sale, which is consequent on such a judgment.

And the first question is, whether the Court was right in over-ruling the motion.

The Statute says, "That where any Sheriff or Constable shall levy any attachment on personal property, claimed by any person not a party to such attachment, such person, his agent or Attorney, shall make oath to such property; and it shall be the duty of such Sheriff or Constable to return the fact of such claim to the Court to which the attachment shall be made returnable; and such Court shall cause an issue to-

Rogers w. Bates.

be joined between the plaintiff and such claimant, and the right of property to be decided on at the same term," &c.

The Statute, in another part of it, which refers to this, says, "and in all cases of claims to lands levied on by virtue of any attachment, the proceedings shall be the same as those pointed out by the preceding section for claims to other property, except that such claim shall be returned to and tried in the Superior Court of the county where the land is situate." (Cobb's Dig. 72.)

The language is, not that the claim is to be returned to that term of the Court to which the attachment is returnable, but that it is to be returned to that Court to which the attachment is returnable—to that Court—not to a different Court.

Whenever, therefore, in any case, the claim has been returned to the same Court to which the attachment has been returned, this language is satisfied, although the claim may not have been put in until after the return term of the attachment.

And this, we think, has been the uniform interpretation of the Statute.

And it certainly appears to be the one which will work best for all-persons interested in the attached property. It is to the interest of these all that the property, when sold, should bring its value. This it will be likely not to do, if it is sold with an outstanding title, ready to be asserted by trover or ejectment, against the purchaser. But if such outstanding title has been asserted in a claim case before the sale, it cannot be asserted in trover or ejectment after the sale.

While, therefore, we may say that it is better that the claim should be put in before the return term of the attachment, than after the judgment term, yet, we must also say that it is better that the claim should be put in after the judgment term, and at any time before the sale, than that it should not be put in at all; and so, that the litigation should

Rogers ps. Bates.

be made to take the form of trover or ejectment, after the sale.

And then, too, there is this reason for making it a question, whether the interposition of the claim ought not, as matter of expediency, to be postponed until after the attachment passes into judgment; the attachment may never pass into judgment; and if it never does, there can never be any need for a claim at all.

It was argued, however, that the "order of sale" being an order to sell the property as the property of the defendant in the attachment, was a judgment of the Court, to the effect that the property was his, and that it was a judgment ad rem; and therefore, was conclusive against all the world.

But a judgment in attachment, is not a judgment to the effect, that the property attached is the property of the defendant in attachment. There is never any issue in an attachment on which such a judgment could be rendered. It is not in attachment cases, as it is in prize cases, that the title to the property attached or libelled is in dispute. In attachments, it is the debt that is the issuable matter.

And then, in prize cases, it is true, I believe, that any body may get a hearing. But in attachments, nobody can do so but the defendant or his representative. If, therefore, in the cases of prize, the judgment ought to bind every body, it does not follow, that in the cases of attachment, the judgment ought to bind every body.

On the contrary, there is a general principle, which amounts to saying, that in these cases, the judgment ought to bind none but the defendant in attachment, if him—the principle, that no man ought to be bound by proceedings of which he has no notice. And none but the defendant in attachment, f he, has notice of the attachment. The advertisement is not notice to the whole world. Attachment is but process—an expedient to compel the appearance of a party.

[1.] We think, therefore, that the Court was right in refusing to dismiss the claim.

The claimant moved to dismiss the levy, insisting that the

Morgan vs. Keith.

plaintiff had not proved a prima facie case of title in the defendant.

What the plaintiff had proved, was this: that the claimant claimed the land under a deed made to him by the defendant in attachment, and made a very few days after the levying of the attachment, and by no other title.

The Court sustained the motion, and we think, erroneously.

[2.] "Where both parties claim under the same third person, it is sufficient to prove the derivation of title from him, without proving his title." (2 Green. Ev. §307.)

No. 101.—Thomas S. Morgan, plaintiff in error, vs. George M. Keith, defendant.

[1.] A defendant is chargeable with full costs, when sued in the Superior Court, although the verdict be for less than thirty dollars; provided it be not rendered in a suit sounding in damages, and the demand set forth in the declaration be not proven to exceed the sum of thirty dollars.

Illegality, in Whitfield Superior Court. Decided by Judge TRIPPE, October Term, 1855.

Keith had sued Morgan for use and occupation of a lot of land, alleging two hundred dollars to be due.

No payment or set-off was pleaded, and the Jury found twenty dollars for plaintiff, and costs of suit. Judgment was entered for twenty dollars, and for one hundred and three dollars costs; and execution issued accordingly.

Defendant took affidavit of illegality to all said costs, except such as would have accrued in a Justice's Court.

The Court dismissed the illegality, and error is assigned on that decision.

Morgan vs. Keith.

WALKER, for plaintiff in error.

Brown; UNDERWOOD, for defendant.

By the Court.—McDonald, J. delivering the opinion.

The only question in this case is, whether the defendant can be charged with more costs than would have necessarily accrued, if the recovery had been before a Justice of the Peace?

[1.] The plaintiff has an election, to sue either in a Justice's Court or one of the higher Courts, on any liquidated demand, debt or account, not exceeding thirty dollars, exclusive of interest; and before the Act of 12th December, 1809, he had a right to recover full costs. That Act, while it did not interfere with this right of election, disarmed plaintiffs of a power which they might use, and which some plaintiffs had used to harrass and oppress defendants with heavy bills of costs. It limited the costs to the amount with which defendants would be chargeable, in Justice's Courts, in cases in which the verdict of the Jury should be for a sum under thirty dollars, and the demand set forth in the declaration should not be proven to exceed thirty dollars. The provisions of the Act do not extend to cases sounding in damages.

The civil jurisdiction of Justice's Courts, is confined to suits for debt, on liquidated demands, or accounts, not exceeding (until the last session of the Legislature) thirty dollars, exclusive of interest. The plaintiff's suit, in this case, was for the recovery of damages, and was not within the jurisdiction of a Justice's Court. It did not, therefore, fall within the provisions of the Act of 1809, and the defendant is chargeable with full costs. The judgment of the Court below must, therefore, be affirmed.

White vs. Ault.

No. 102.—EDWARD WHITE, plaintiff in error, vs. HENRY AULT, defendant.

- [1.] A being indebted to B, and C to A, they get together and agree that B shall surrender up A's note and take C's in its place—A, at the same time, cancelling his claim against C for the same amount. A and C both give a mortgage to B, to secure the note from C to B: Held, that this constitutes. A a security only to B for C; and further, that if B give time to C, of payment, without the consent of A, either express or implied, A is discharged.
- [2.] An agreement by one person to let another retain the rent accruing annually on real estate, to indemnify the occupant against usurious interest, which he pays to a third person, is void.

In Equity, in Whitfield Superior Court. Tried before Judge TRIPPE, October Term, 1855.

Edward White filed his bill against Henry Ault, setting forth, that he had been indebted to the said Ault the sum of \$1649 46; that one Charles A. Stafford, at the same time, was indebted to complainant the sum of \$2100; that the parties agreed together that Stafford should give Ault his notes in lieu of those of complainant, which was done; that Stafford executed to said Ault, to secure said notes, a mortgage on real estate, which Ault neglected to have recorded; that complainant also executed to Ault a deed to certain lots, Nos. 53 and 55, on Thornton Avenue in Dalton, on one of which was a house worth one hundred dollars a year for rent; that this deed was intended as an equitable mortgage, to secure said notes of Stafford, which was evidenced by a written memorandum taken from Ault at the time. These things were all done in September, 1848; that Ault took possession of said house, and occupied the same by his tenants; that two of the three notes given by Stafford, were sued upon by Ault; and that in November, 1849, it was agreed between Ault and Stafford, without the consent of complainant, that if Stafford would withdraw certain pleas that he had filed, that execution on the judgments should be stayed for a spe-

White se. Ault.

cified time. The bill also charged that Stafford died, and that Ault suffered his estate to be paid out to inferior claims, and made other charges of fraudulent conduct in relation to said estate.

The bill sought to have the deed to said lots on Thornton Avenue delivered up, and Ault decreed to pay rent for the same. The bill also charged, that at the time of the exchange of notes in 1848, as before stated, that Ault represented to complainant, that in consequence of his (complainant's) failure to pay his said indebtedness, he, Ault, had been compelled to borrow money at usurious interest; and to indemnify him for the loss thus sustained, complainant had made him a deed to another lot on Thornton Avenue.

This deed complainant prayed might be delivered up, as founded on usurious consideration. Other points were made by the bill, not necessary for the elucidation of the decision of this Court. The answer of defendant denied the alleged consideration for the last named lot, but stated that it was given for other indebtedness of White to him. The agreement with Stafford was admitted to have been without notice to complainant.

The answer stated that it was agreed that defendant should have the rents of the house on Thornton Avenue, for the purpose of re-imbursing him for the interest he had to pay above legal, in consequence of not receiving the cash from complainant. The Court charged the Jury, on the trial, that the facts did not constitute White a security to Stafford, and that he was not relieved by said agreement, unless he was injured by the delay or neglect of defendant; that if it was agreed that the rents of the house were to be retained by Ault to indemnify him for the usurious interest he would have to pay or had paid, that White was bound by that agreement.

And on these decisions error is assigned, the Jury having found for defendant, and complainant excepting.

WALKER, for plaintiff in error.

SHROPSHIRE; GORDON, for defendant.

White vs. Ault.

By the Court.—LUMPKIN, J. delivering the opinion.

[1.] What relation did White sustain to the debt from Stafford to Ault, after the substitution was made? We think there can be no doubt that it was that of guarantor or security only—not security even for the whole debt, but to the extent of the property which he mortgaged to secure it.

True, he was the original and principal debtor to Ault, as Stafford was to him. But the parties get together and agree that there shall be a transposition of these liabilities; that Ault shall surrender up his demand on White—White his on Stafford, and that Ault shall take the notes of Stafford, secured by a mortgage from Stafford on the Cherokee House, and by a mortgage from White on the house and lot owned by him on Thornton Avenue. And there was an exchange, cancellation and execution of papers accordingly; consequently, we hold upon this branch of the case, that the question of release did properly arise between White and Ault, growing out of the agreement by Ault, on the 24th of December, 1849, to give further time of payment to Stafford on the mortgage debt.

And further, it is the opinion of this Court, that if time of payment was given by Ault to Stafford, beyond that specified in the notes, without the consent of White, either express or implied, so that Ault himself could not coerce payment within that period, nor be compelled to do so by White the security, nor the security himself do so, by paying up the debt and getting the control, that the surety is absolutely discharged. (2 Hare & Wallace's Amer. Lead. Cases, 159, 160.)

[2.] Further, we hold, that it was error in the Court to instruct the Jury, that the rent accruing on the house and lot on Thornton Avenue, might be retained and appropriated by Ault to re-imburse himself in usurious interest, which he might have to pay on borrowed money. Had White made a

Cooper vs. White, adm'r.

contract to that effect, it would not have been binding; for an agreement to indemnify another against a violation of the law, must be void.

We express no opinion as to that part of the case. which refers to the sale of Stafford's property, for the reason, that the facts connected with this whole transaction are too. vaguely and indefinitely set forth in the record, to enable usto form a satisfactory opinion. For instance, we are ignorant as to the date of Bryant's mortgage, when it was fore-closed, whether before or after Stafford executed the mortgage to Ault. We know not the date of Blount's judgment; the bill of exceptions does not show whether the Cherokee House and the personal and perishable property of Stafford was sold under any one or more or all of these outstanding liens against Stafford or his property. The liability of Ault, . the purchaser, to account with White, the security, concerning this property, may depend somewhat, if not altogether, upon a clear understanding of some one or more of these facts.

No. 103.—MARK A. COOPER, plaintiff in error, vs. EDWARD WHITE, administrator, defendant.

[1.] If goods or money belonging to another person, be amongst the goods of the deceased, and they come altogether to the hands of the administrator, the goods or money of such other person, are not assets in the hands of the administrator.

In Equity, in Whitfield Superior Court. Decision by. Judge TRIPPE, October Term, 1855.

This was a bill filed by White, administrator of L. W.

Cooper vs. White, adm'r.

Howe, against the creditors of said Howe, for the adjudication of their claims against the estate.

It appeared from the answer of Mark A. Cooper, which was admitted to be correct, that he had employed Howe to sell iron castings for him; that he let Howe have a storehouse, rent free, in consideration of these services; that Howe kept the money arising from the sale of castings in a separate drawer, where it was found after his death; and that he had on hand a quantity of castings, belonging to said Cooper. The Court held that the indebtedness to Cooper for the castings on hand, as well as those sold, should take rank as open accounts. To which decision plaintiff in error excepts.

Brown; Underwood, for plaintiff in error.

AKIN, for defendant.

By the Court.—McDonald, J. delivering the opinion.

The answer of Cooper, states that the iron was deposited with the intestate, Howe, for sale for cash; and the cash received was to be held as his, Cooper's, at all times. There was, at the time of Howe's death, a certain amount of money, arising from the sale of the castings and iron of said Cooper, on hand, on deposit, in the possession of said Howe, where he usually kept the money of Cooper, which was the amount due to Cooper. The castings and iron of Cooper were delivered to him by the administrator, after the death of Howe, but the administrator refused to deliver the money.

[1.] The facts stated in Cooper's answer, were agreed upon as true. Upon these facts, the Court below held, that when the iron was sold and converted into money, Cooper became an open account creditor of the intestate, and that he must be put on a footing with that class of creditors. Is this judgment of the Court erroneous? In what relation did the intestate himself stand to the fund which is claimed by

Cooper rs. White, adm'r.

Cooper? "The representatives cannot be in any better plight than the intestate himself would have been in." Hassall vs. Smithers, (12 Veasey, 122.) "If the goods of another man be amongst the goods of the deceased, and these come altogether into the hands of the executor or administrator, these goods, that are the goods of another, shall not be said to be assets in the hands of the executor or administrator." (Shep. Touchstone, 498.) On the conversion of Cooper's castings and iron into money, the money became Cooper's. The intestate could not have used it without committing a crime. (36th Sect. of the 6th Div. Penal Code.)

According to the answer, the money on hand in the possession of the intestate, arose from the sale of the iron and castings; it was where he usually kept Cooper's money, and was the amount due to Cooper. By contract with Cooper, it was to be held as his, Cooper's, money at all times. facts stated in the answer of Cooper, show that the intestate had not subjected himself to the Criminal Law; that he had the amount for which he had sold the iron and castings, and the inference is clear, that he held it as Cooper's money. The administrator cannot, under these circumstances, use Cooper's money to pay the debts of Howe's creditors. property, in its original state and form, is covered with a trust in favor of the principal, no change of that state and form, can divest it of such trust, or give the agent or trustee converting it, or those who represent him in right, (not being bona fide purchasers for valuable consideration, without notice,) any more valid claim in respect to it, than they respectively had before such charge." (2 Sto. Eq. Ju. §1258.) The cash in hand in the possession of the intestate, arose from the sale of the iron and castings. It was the identical money, therefore, and cannot be retained as assets of the intestate.

Let the judgment of the Court below be reversed.

Dugas vs. Lawrence.

No. 104.—L. A. Dugas, plaintiff in error, vs. SILAS LAW-RENCE, defendant.

[1.] A sale of a chance in the Land Lottery, authorized by the Act of 1830, was valid.

Ejectment, in Walker Superior Court. Tried before Judge TRIPPE, November Term, 1855.

This was an action of ejectment, in which the plaintiff relied on the following title: William Whitcombe being entitled to certain draws or chances in the Land Lottery of 1830, on the 25th day April, 1832, said lottery being not yet drawn, sold and transferred his draws or chances to L. A. Dugas, by assignment under seal, and purporting to be for a valuable consideration.

The same instrument contained a power of Attorney to John W. Wilde, to take out the grant and make titles to Dugas for such lots as Whitcombe might draw in said lottery. He did draw a lot; and in December, 1832, Wilde, under said power of Attorney, made a deed of said lot to Dugas.

The question was on the validity of this deed. The Court held the deed and assignment void; and on this decision, error is assigned.

ALEXANDER, for plaintiff in error.

AKIN; HULL, for defendant.

By the Court .- BENNING, J. delivering the opinion.

[1.] Was the sale of the chance valid?

Chancellor Kent lays it down, "That all contingent and executory interests are assignable in Equity, and will be enforced, if made for a valuable consideration; and it is settled that all contingent estates of inheritance, as well as

Dugas vs. Lawrence.

springing and executory uses, and possibilities coupled with an interest, where the person to take is certain, are transmissible by descent, and are devisable and assignable. If the person be not ascertained, they are not then possibilities coupled with an interest, and they cannot be either devised or descend, at the Common Law. Contingent and executory, as well as vested interests, pass to the real and personal representatives, according to the nature of the interest, and entitle the representatives to them when the contingency happens." (4 Kent. 269. (261 old Ed.)

This we take to be well supported by the authorities cited for it; and therefore, we regard it as a true statement of the law, so far as the present case is concerned.

Thus regarding it, we are constrained to consider the sale of the chance to have been valid.

This result would also, perhaps, be arrived at by treating the question as one governed entirely by our own Statutes.

The first Lottery Act, that of 1803, prohibited the sale of "tickets" in the lottery. There would have been no need of this prohibition, if the old law had already prohibited such sale.

The Lottery Act of 1806 contained no such prohibition, nor did that of 1818, whilst that of 1825 did. (Clay's Dig. 250; Lam. Dig. 416; Daw. Com. 255.) But in 1826 this prohibition was repealed. (Daw. 260.) Why was this repeal but to give persons a right to sell their chances? In the opinion of the Legislature, therefore, all that was needed to give them this right, was a repeal of the prohibitory law. The Legislature did not think an enabling law necessary, for it passed none.

And an opinion of the Legislature as to what the law was, so long entertained, so repeatedly manifested, and no doubt so extensively acted on by the people, is entitled to the greatest respect.

And it is to be remembered, that the Constitution of 1798 contains the following declaration: "And this Convention doth further declare and assert, that all the territory without the

Morris et al. vs. Underwood et al.

present temporary line and within the limits aforesaid, is now, of right, the property of the free citizens of this State, and held by them in sovereignty inalienable, but by their consent."

Did not every free citizen of this State have some vested right in the public lands, before their partition by lottery or sale?

We think that the Court below erred in holding that the assignment and deed were void.

No. 105.—James Morris et al. plaintiffs in error, vs. Wil-LIAM J. Underwood et al. defendants.

[1.] The title to an office will not be tried in a proceeding of quo warranto, when, at the time of trial, the term of office is expired, and no judgment of ouster can be pronounced.

Quo warranto, in Whitfield Superior Court. Decided by Judge TRIPPE, October Term, 1855.

This was an information in the nature of a quo warranto, filed by William J. Underwood and others, against James Morris and others, to show why and by what authority they exercised the office of directors of the "Planters' & Mechanics' Bank of Dalton," and used the franchise of banking.

The affidavits of the relators set out sundry irregularities in the organization of said bank, and the election of defendants as directors.

It appeared that the term for which said directors were elected, expired in August, 1855, and a new election was then held; and this rule nisi came on to be heard and a rule absolute was granted October Term, 1855, requiring the defendants to answer the information.

Morris et al. ve. Underwood et al.

To this order, granting the rule absolute, the defendanta. excepted.

Brown; Moore, for plaintiffs in error.

WALKER, for defendants.

By the Court.—LUMPKIN, J. delivering the opinion.

[1.] A rule nisi was granted by the Judge of the Superior Court of Whitfield County, at the instance of William J. Underwood, Brodwell E. Wells and Richard H. Sapp, requiring James Morris, Robert Y. Cook, John Anderson, Richard C. Cook and William L. High, to show cause why an information, in the nature of a quo warranto, should not be filed against them, calling upon them to show by what authority they were exercising, as the directors of the Planters' & Mechanics' Bank of Dalton, the franchise of banking. Upon the hearing in October last, the rule was made absolute; and the bill of exceptions is filed to this decision.

The Legislature of 1853-'4, incorporated the Planters' & Mechanics' Bank of Dalton. (See Pamphlet Acts, p. 188.) The corporators were William J. Underwood, Owen H. Kenan, William L. High, Euclid Waterhouse and James Morris, and such other persons as they might procure, to take stock under the charter. The capital of the bank was \$150 .-000, with the privilege of increasing it to \$250.000. stock was divided into shares of \$100 each, and appropriated among the aforesaid stockholders, and such other persons as they might associate with them. The affairs of the corporation were to be managed by five directors, to be elected by the stockholders as soon as specie to the amount of \$10.000 The directors first elected, were to serve until the first Monday in April, 1855, and were to be elected, annually, on the same day thereafter. They were to be elected by a majority of the votes given in; and if the stockholders failed to elect on the day designated, they might do so at any

Morris et al. vs. Underwood et al.

other day, to be regulated by the rules and by-laws of the corporation. The failure to pay assessments, incurred a for-feiture of the stock; and if the bank was not organized and put into operation in two years after the passage of the Act, the corporate privileges were forfeited.

Books of subscription to the capital stock were opened, and the citizens of Whitfield and Murray Counties were invited to subscribe. The small book in which the names of the subscribers were entered, contained a caption to the effect, that the subscribers obligated themselves to pay such instalments as the directors might assess; and further, that the directors were authorized to transcribe or transfer to any other book, the names and number of shares subscribed for by each individual.

The whole amount of stock subscribed for, was 1546 shares, or \$154.600. Of that amount Morris, High and William K. Moore subscribed for 1230 shares, or \$123.000; and they procured the transfer or control of 231 shares more, making the whole amount owned and controlled by them 1451 shares; and leaving 95 owned by others. Of this, Sapp, one of the relators, owned 50 shares; Wells, another, 20 shares; and Underwood, ten shares.

Sometime thereafter, to-wit: on the 29th of July, 1854, Morris, High and Moore relinquished 1410 of their shares to Samuel F. Dickinson, and entered his own name in lieu of theirs, upon the new book for that number of shares; and the names of all the original stockholders, together with the number of shares owned by each, respectively, were transferred to the new book, in which the name of Dickinson was entered, except that of Wells; that after the subscription had closed, Morris, High and Moore subscribed for the remaining shares. The reason why Wells' name was omitted was, that High, his partner and intimate friend, (Wells being absent from home at the time,) took upon himself the responsibility of withdrawing Wells' subscription. When Wells returned, he expressed himself dissatisfied with the arrange-

Morris et al. se. Underwood et al.

ment; and the offer was made to re-transfer to him the number of shares which he owned.

The \$10.000 required in specie was paid in gold, Morris making the pro rata advance, to-wit: \$600 on the shares not represented. An election was held and the five respondents were chosen, no one voting but Dickinson, who cast 1410 votes of the 1425 represented at the meeting. No notice was given to the relators. White, Wells and Sapp were absent at the time. Underwood was in town during the day and agreed, in the morning, to sell his shares, receiving his share of the bonus or premium on the stock, but retracted his offer, remarking, that it would take \$100 to buy hisstock.

On the evening of the day on which the election was held, Morris informed Underwood of what had transpired; and that he had advanced for him, on his stock, \$66 663; and he expressed no dissent or dissatisfaction, but promised to refund the money the next day. He afterwards assigned, as a reason why he did not comply with his promise, that hewas threshing wheat. None of the relators ever paid back to Morris the per centage which he advanced for them; nor did any other act, except that of originally subscribing for the stock.

The \$10.000 paid in gold to the commissioners, was turned over to the directors. And on the 14th of September, 1854, \$40.000 more was paid in by Dickinson on the 1410 shares owned by him.

Relators have been offered back their stock, or to be released from all liability, and to be paid the premium on their shares received from Dickinson.

When the first bills were issued, the word "of" Dalton was left out of the name of the bank, by mistake of the engraver. It has since been corrected. In September, 1854, the directors called upon the stockholders to pay in, in December thereafter, 263 per cent: on their stock, which was duly published. Underwood, Sapp, Welborne and Ford failing to respond, their stock was declared to be forfeited.

Morris et al. vs. Underwood et al.

The term of service of the old directors having expired in April, 1855, Morris, High, Anderson, Kibbie and were elected for the next twelve months. Sixty votes were cast by Kibbie, residing out of the State, and 1440 votes by persons living in Georgia.

Should the rule, under this state of facts, have been made absolute?

In England, notwithstanding the term of office has expired for which the incumbert has been elected, who is sought to be removed, still, the Courts of that country will grant leave to file the information for the purpose of inflicting a fine for the usurpation; and that, too, perhaps, where no judgment of ouster can be awarded. It will be found, however, that even there, this is only done in those cases where the office illegally held, is one of a public nature, such as mayor, &c. But the American Courts, from the peculiarity of their constitutions, laws and forms of government, or for some other cause, have, with great unanimity, repudiated this doctrine of imposing a penalty. It has never been enforced in this State, even where the proceeding was directly at the instance of the State. Much less would it be in a case like this, where the effort making is not to forfeit the charter of the bank, but to redress the wrongs of the relators within the corporation. In such a case, it is strictly a civil proceeding.

In this case, the term for which these directors were elected, had expired by efflux of time, six months before the rule There could, therefore, be no judgment was made absolute. of amotion rendered. And if no fine could be inflicted, why order the information to be filed? Why trouble the country with a trial which could result in nothing beneficial to the applicants, or prejudicial to their opponents? In New York and Massachusetts, the information has been refused when the time must expire, before the inquiry would have any effect, leaving the parties to their common remedies. A Ames on Corporations, 436-77.) Much less, then, will the suit be entertained, where the term of office has already expired.

Morris et al. vs. Underwood et al.

There are many matters in this record which might be invoked to justify this conclusion. The relators claim but a small portion of this stock—80 out of 1500 shares. Whatever irregularity, therefore, may have crept into the election from want of notice or otherwise, their vote could not, by any possibility, have changed the result.

Again. They have acted capriciously in relation to their stock, refusing either to relinquish or pay any instalment upon it. And what difference is it to them or any one else, whether the subscription remains on the little pocket book in which it was originally entered, or has been transferred to another, as they, themselves, stipulated and agreed might be done? We cannot but consider this, and many of the other irregularities complained of, as entirely frivolous; especially the omission by the engraver, in the first issue of bills, of the word "of" in the title or style of the bank.

Besides all this, it is not pretended that the directors elected were not capable and honest, or that the public is likely to be injured by their misconduct.

When we see, then, that the success of this application would tend to the dissolution of this charter, indeed, must inevitably produce this result—because, if the first organization is declared void, the two years will have passed, limited by the law, within which the bank was to go into operation—we repeat, that in view of all these circumstances, and the further fact, that no attempt is made by the State, through its constituted organs, to revoke the franchise which it has granted, we cannot doubt but that it was error to allow the quo warranto information to be filed.

Willcoxon, adm'r, vs. Eason.

No. 106.—John B. Willcoxon, administrator, plaintiff in error, vs. Harrison Eason, defendant.

- [1.] More inadequacy of price is not, per se, sufficient to set aside a contract, if not so gross as to prove fraud or imposition.
- [2.] Where the inadequacy is so great as to give to the transaction the character of unreasonableness and hardship, the Court and Jury will stay the exercise of their discretionary power, in enforcing a specific performance.
- [2.] Where relief is refused, the Courts sometimes leave the party to seek his compensation in damages at Law, on account of the money paid; but wherever a rescision of the agreement is decreed, the better practice is, to require the purchase money to be refunded.

In Equity, in Coweta Superior Court. Decided by Judge Bull, September Term, 1855.

This was a bill filed by Harrison Eason, against John B. Willcoxon, administrator of Moses Kelly, deceased, Thomas M. Kelly, John C. Wright and Bailus Dyer, setting forth the following case: That in 1849, the said Moses Kelly, then in life, being old and infirm, and being deserted by his family, moved by consideration of love and affection towards complainant and his wife, who was the neice of said Moses, as well as in consideration of a bond given by complainant to take care of and maintain him as long as he lived, (and which obligation complainant alleged that he faithfully performed,) he, the said Moses Kelly, executed to complainant a deed of gift of all his estate, both real and personal.

Afterwards, Moses Kelly died intestate, leaving his property in complainant's hands, and leaving a widow and four children, one of whom was the defendant, Thomas M. Kelly, and two of whom being daughters, had intermarried with defendants, Wright and Dyer; that after the death of Moses Kelly, his family threatened complainant with law suits to set aside the said deed; and he, to avoid litigation, paid to the said Kelly, Wright and Dyer, two hundred dollars each,

Willcoxon, adm'r, vs. Eason.

and took from them, under seal, a full release and acquittance of all their respective shares in said estate.

That afterwards, defendant, John B. Willcoxon, obtained letters of administration on the estate of Moses Kelly, and commenced an action against complainant for the property; which action was compromised by complainant surrendering the property and taking from the said Willcoxon an obligation to pay to him, as soon as the estate could be wound up, three-fifths thereof, being the shares of said Kelly, Wright and Dyer, upon condition that complainant would procure and furnish to him full receipts from the said parties of their distributive shares in the estate. Complainant alleged that he made this compromise in the belief that Kelly, Wright and Dyer would give him the desired receipts for the administrator without difficulty; but they refused to do so, and the administrator is about to turn over said distributive shares to them; wherefore, complainant filed his bill, praying that Willcoxon be enjoined from paying said shares to Kelly, Wright and Dyer, and that he be decreed to pay them to complainant, and that Kelly, Wright and Dyer, be decreed to give their receipts therefor to the administrator.

To this bill defendants demurred generally, for want of Equity.

The demurrer was over-ruled, and this decision is alleged as error.

SIMMS, for plaintiff in error.

BUCHANAN & McKinley, for defendant.

By the Court.—LUMPKIN, J. delivering the opinion.

[1.] We think this bill should be retained till the hearing, or at least, until the answers of the defendants come in. Willcoxon is but a stake holder, the real parties being Eason and the distributees of Moses Kelly. If the purchase made of the three distributees is founded upon a consideration so

Williams, adm'r, vs. Philpot and another.

grossly inadequate as that, in connection with other circumstances attending the transaction, it cannot be enforced, let a Court and Jury decree its rescision. But before this is done, the money paid by Eason should be refunded.

- [2.] The main question involved, is one which addresses itself peculiarly to the consideration of a Special Jury. It is for them, rather than for the Court, to say whether the inadequacy of the price paid by Eason for these distributive shares, is so great as to give to the contract the character of unreasonableness and hardship; so much so, as to induce them to stay the exercise of their discretionary power in enforcing its performance.
- [3.] We are aware, that under such circumstances, the party is sometimes left to seek his compensation in damages at Law. We think it, however, better every way, that the whole matter should be settled by one decree. It saves expense and delay, and more complete justice is likely to be done.

- No. 107.—Solomon F. Williams, administrator, plaintiff in error, vs. David A. Philpot and another, defendants.
- [1.] If the answer swears off the equity of the bill, a verdict for the defendant ought to stand, unless the answer is contradicted by more evidence than that of a single witness.

In Equity, in Heard Superior Court. Tried before Judge Bull, May Term, 1855.

This bill was filed by Williams as administrator of Oliver M. Porter, against David Philpot, and set forth that said intestate, when in life, became security for one Green B. Mc

Williams, adm'r, rs. Philpot and another.

Donald on fourteen promissory notes of thirty dollars each, to the said Philpot.

The bill charged, that the money was loaned to McDonald at usurious interest; and also, that after the giving the notes, Philpot took a deed from McDonald for certain lots of land; and in consideration thereof, agreed to wait with said notes until he could sell said land, and apply the proceeds to the payment thereof. The bill charged that Philpot had now sued the complainant in the Justice's Court, and that he had no means of proving portions of his defence, except by a resort to the conscience of defendant. The bill prayed injunction, discovery and relief.

The answer of defendant denied the usury, and denied any contract with McDonald to give him time on said notes.

There was also a charge in the bill, that complainant had given notice to Philpot to sue on said notes, which he had failed to do within the time prescribed by the Statute. The answer denied any such notice.

On the trial, complainant proved the giving the deed from McDonald to Philpot, and an agreement between them that Philpot would sell the same and apply the proceeds to said notes.

GREEN B. McDonald testified: That the agreement was, that Philpot would sell the land and apply the proceeds to the notes; and also, that he would indulge McDonald on said notes, until he could make the sale.

The Court charged the Jury, that if they believed from the evidence, that any change had been made in the original contract, by which time had been given or additional security taken, they must find for complainant.

The Jury found for defendant; whereupon, complainant moved for a new trial, on the ground that the Jury found contrary to the charge of the Court, and contrary to equity and to the evidence in the cause.

The motion for a new trial was over-ruled by the Court; and on this decision error is assigned.

Tompkins ve. Williams.

G. J. WRIGHT, for plaintiff in error.

MABRY, for defendants.

By the Court.—BENNING, J. delivering the opinion.

[1.] Was the Court below right in refusing a new trial? The answer positively denies the equity of the bill; and an answer is good until met by the evidence of two witnesses, or of one aided by circumstances.

In this case the answer was met by the evidence of Mc-Donald only—by the evidence of but a single witness.

We cannot say, therefore, that we think the Court was wrong in refusing a new trial.

No. 108.—Nicholas Tompkins, plaintiff in error, vs. Solomon F. Williams, defendant.

- [1.] A discrepancy between the name of the witness in the interrogatories and to the depositions, will not exclude the testimony, it being conceded that the opposite party knew what person was intended to be examined, and directed his cross-questions accordingly.
- [2.] Where a witness is questioned in the direct interrogatory, as to a conversation which he had with one of the parties; and upon the cross-examination, is requested to state who was present when the conversation transpired, and he testifies, in answer to the direct interrogatory, to two conversations instead of one; and upon his cross-examination, only states who was present at one of the conversations, the testimony will be excluded.
- [3.] To make testimony relevant, enough should be proven to show its applicability to the matter in issue; otherwise, it will be rejected.
- [4.] There is no limit but the discretion of the Court, as to the introduction of testimony by way of reply, rebutual, surrebuttal, rejoinder, surrejoinder, &c.

Tompkins vs. Williams.

- [5.] A vendor who gives to the vendee his bond for titles to land, taking his notes in payment of the purchase money, and afterwards transfers the notes without recourse over against him, cannot maintain an action of ejectment against the vendee, on his own account, to recover the land.
- [6.] Whether his name may not be used by the transferee of the notes to enforce payment, or he be compelled, in Equity, to execute a conveyance to the holder of the notes for the same purpose—Quere?

Ejectment, in Heard Superior Court. Tried before Judge Bull, November Term, 1855.

Before this cause was submitted to the Jury, the plaintiff moved the Court to reject the depositions of Jesse J. Cavender, on the ground that the commission issued for John Cavender, and the commissioners had inserted Jesse J. in lieu of John. It was not denied, however, that the person was the same, and known to be so when the interrogatories were crossed; and that the interrogatories had been in office twelve months, and no objection before filed. The Court rejected the testimony, and defendant excepted.

It appeared, on the trial, that the plaintiff, Solomon F. Williams, originally had the title to the land in dispute; that on the 8th day of December, 1849, he sold the land to one William P. Dobson, and received Dobson's notes for the purchase money, and executed a bond to make titles to Dobson, "or his assigns," on the payment of the purchase money. Dobson subsequently sold the land to Nicholas Tompkins, and Tompkins paid Dobson for the land and took Dobson's bond for titles, and also an assignment of Williams' bond to Dobson. Williams transferred the notes of Dobson without indorsement, and afterwards brought this action of ejectment against Tompkins for the land. On the trial, the Counsel for the defendant in the Court below, asked the Court to instruct the Jury-"That if they should find that Williams had transferred the notes given him by Dobson for the land, without recourse on Williams, that this was a payment as to Williams, and he could not maintain ejectment for the land." The Court refused this request, and this is the main ground

Tompkins vs. Williams.

of error relied on for review. In the progress of the trial, the plaintiff tendered in evidence fourteen Justice's Court f. fas. against William P. Dobson, in favor of Solomon F. Williams, as administrator of Oliver M. Porter, and the defendant objected to their admission as irrelevant, as there was no evidence that the notes on which the judgments were of tained were the ones given for the purchase money; and that they could have no relevancy to the issue between the parties before the Court. The Court over-ruled the objection and admitted the evidence, and this, also, is excepted to.

- B. II. HILL; SIMMS, for plaintiff in error.
- G. J. WRIGHT, for defendant.

By the Court.—LUMPKIN, J. delivering the opinion.

[1.] Was the Court right in rejecting the testimony of Jesse J. Cavender?

We think not. It being conceded that the plaintiff knew the person intended to be examined, and that he had directed his cross-examination accordingly, he could not possibly have been injured by the misnomer. Besides, the case being on the appeal, and the interrogatories having been filed in the Clerk's office for more than twelve months, the objection should have been made in writing, before the case was submitted to the Jury. It was apparent on the face of the papers.

[2.] We hold that the testimony of Joseph B. Merrell was properly excluded. The direct interrogatories, it is true, referred only to a single conversation with Williams. It did not, however, identify the conversation as to time or place. But the witness, in his answer, relates two conversations which he held with Williams—one at Porter's house in 1850, the day before Porter died; and the other in 1851, when an inventory was taken on his estate.

Now having voluntarily, but in obedience to the obligation

Tompkins es. Williams.

imposed by his oath, to tell the whole truth, mentioned what transpired on both of these occasions, the witness should have considered the cross-question as to who were present, &c. as applicable to both, and have answered accordingly.

- [3.] The object in introducing the fourteen fi. fas. in favor of the estate of Porter against Dobson, was to show that the whole purchase money for the land had not been paid by Dobson; but to make this proof relevant, the plaintiff should have gone further, and identified this debt as a part of the purchase money. It does not appear but that these executions may have been founded upon some other and totally distinct consideration. The testimony should have been rejected.
- [4.] Was the Court wrong in allowing John Smith to be sworn, to disprove the solvency of Dobson? We think not. The proof was to rebut the new evidence submitted by the defendant, as to the solvency of Dobson since plaintiff had closed.
- [5.] But the main question in this case is, was Williams entitled to maintain this action on his own account?

He had transferred the notes given by Dobson to him, in payment for the land, to Porter, without recourse or liability over against him. What interest had he in the land? He only held the legal title to secure the notes; and he had parted with the notes for value, and upon terms which exonerated him from all responsibility. To our minds, it is clear that he could not sue for himself.

[6.] We will not say that his name might not be used by the holder of the notes for the purchase money, to enable the transferee to enforce payment; nor will we say but that the holder could, by a proceeding in Equity, compel Williams to convey him the title for the same purpose. We simply, however, mean to deny that Williams is entitled to eject Tompkins for his own benefit. And who has asked him to interpose for any body else? Perhaps the holder may not desire it. And could Tompkins, by filing a bill against Williams, and tendering the balance of the purchase money to him, get a

Sample vs. Carey & Stanford.

title? Surely not. For no one but the holder of the notes is entitled to receive the money.

We have not alluded to the fact, that Williams happens to be the administrator of Porter, as no reliance was put upon that circumstance in the argument. The case has been managed, throughout, and was discussed before, solely upon the assumption, that Williams was entitled to bring this ejectment in his own name and on his own account, he being the owner of the legal title, and the purchase money not having been fully paid to his assignee, Porter.

Suppose Williams were permitted to recover the land—what then? It could not be treated nor administered as the property of Porter's estate. It is manifestly improper and absurd to allow a vendor, who has parted with the land by giving a bond for titles, and parted with the notes given for the purchase money, without recourse, to intermeddle further with the land.

No. 109.—James A. Sample, plaintiff in error, vs. Cary & Stanford, defendants in error.

[1.] If the surety on appeal becomes insolvent pending the appeal, the appellant has the right to save the appeal, by filing an affidavit that he was advised and believed that he had good cause of appeal; and that owing to his poverty he was unable to give any better security than that which he did give.

Assumpsit, in Heard Superior Court. Tried before Judge Bull, November Term, 1855.

This was an action of assumpsit on an open account, brought by Cary & Stanford against James A. Sample as surviving co-partner, &c. At the April Term, 1852, the defendant

Sample vs. Carcy & Stanford.

confessed a judgment for \$222 20, reserving the right of appeal. And at the same term he entered an appeal, giving Noah M. Harris as his security on the appeal bond.

At the November Term, 1855, of said Court, the cause came on to be tried on the appeal, when Counsel for plaintiffs moved to dismiss the appeal, on the ground, that pending the appeal, the security had become insolvent. This fact was admitted by the defendant, who then and there, being unable to give other security, moved the Court to be allowed to continue the appeal, by filing his affidavit in terms of the law, "that he was advised and believed that he had a good cause of appeal; and that owing to his poverty, he was unable to give other good security as required by law;" which motion the Court over-ruled, and dismissed the appeal; and Counsel for defendant excepted.

MABRY, for plaintiff in error.

HILL, for defendants.

By the Court.—Benning, J. delivering the opinion.

[1.] The question is, was it the right of the appellant to save his appeal by filing such an affidavit as that which he proposed to file.

We think it was. We have so decided in two cases— Burkhalter vs. Bullock, (18 Ga. 371,) and another since, the name of which I forget.

We, therefore, reverse the decision of the Court below.

Whitaker *s. Tompkins, adm'r.

No. 110.—P. H. WHITAKER, plaintiff in error, vs. NICHOLAS TOMPKINS, administrator, defendant.

[1.] A stipulates with B in writing, that if he will become his security en his note for the purchase money of a lot of land, and pay one half of it, he shall be entitled to a moiety of the land. B signs the note as security, pays more than one half of the price, and has the credit entered to him as security: Held, that the form of the endorsement does not and cannot deprive him of the benefit of his agreement; and that the verdict of the Jury, to the contrary, is not only against law, but without evidence to support it.

Claim, in Heard Superior Court. Tried before Judge Bull, November Term, 1855.

Nicholas Tompkins, as administrator of Giles S. Tompkins, being about to sell a certain lot of land as the property of his intestate, Pleasant H. Whitaker, interposed a claim to one undivided half of said lot, which he alleged to be his. The land appeared to have been sold by one Banks, as administrator of George M. Smith, and was bid off by Giles S. Tompkins, and the deed made to him.

The land was bid off at sixty-seven dollars, and Tompkins gave a note with Whitaker as security, for \$47,600, in part of the purchase money. The claimant showed an agreement in writing, signed by Giles S. Tompkins, to the effect, that Whitaker was to have one half the lot on paying one half the purchase money.

This agreement was dated on the same day that the land was sold. Several witnesses testified to having been present when said agreement was made; and that in consequence of it, Whitaker consented to stand security for Tompkins on the note.

Claimant proved by Joseph C. Meeks, that he had called on Giles S. Tompkins to purchase said lot, and that Tompkins told him that one half the lot was Whitaker's, and referred him to Whitaker for the purchase of it.

The claimant also produced the said note, on the back of

Whitaker vs. Tompkins, adm'r.

which was a receipt of the amount due on it from P. H. Whitaker, signed by one Oliver as Attorney, in fact, for Banks. Oliver was introduced, and testified that Whitaker paid him the money. The administrator introduced no evidence in rebuttal.

The Court charged the Jury, that if they believed that Whitaker paid the money simply because of his liability assecurity for Tompkins, they should find for the administrator; but if he paid it on the faith of, and in fulfilment of the contract, then they ought to find in favor of Whitaker.

The Jury found the land the property of Giles S. Tomp-kins.

Whereupon, the claimant moved for a new trial, on the ground that the Jury found contrary to the evidence; and on the ground of error in the Court in the charge above stated; and on the further ground, that since the trial of the cause, he had discovered witnesses who would testify that Giles S. Tompkins, in his lifetime, and within a short time-before his death, had said to sundry persons, that half the land in dispute belonged to claimant, and that claimant had advanced his part of the purchase money for the same.

The Court refused to grant a new trial; and on this decision error is assigned.

SIMMS, for plaintiff in error.

FEATHERSTONE, for defendant.

By the Court.—LUMPKIN, J. delivering the opinion.

[1.] Giles S. Tompkins contracted with P. H. Whitaker, that if he would pay one half of the purchase money for the land, and become his security, that he should be entitled to one half of the lot. Whitaker became security and paid more than one half of the price at which the property was bid off, and had the credit entered on the back of the note as

Denson et al. ve. Patton.

paid by him as security, which he purported to be upon the face of the paper.

Shall this deprive him of the benefit of his written agreement with Tompkins, about which there is no controversy? Was it not right to have the payment thus endorsed? It was in strict conformity with the understanding between the deceased and himself and the facts of the case; and moreover, was necessary to entitle him to the rights of a security quoad the excess of payment over his half.

This contract was reduced to writing—was never repudiated by Mr. Tompkins in his lifetime, and one which Mr. Whitaker could not avoid since his death, if he would. Suppose he had undertaken to collect the money thus paid from the estate of Tompkins; would he not have been estopped by the testimony in this record, and a tender, by the administrator, of a conveyance, to one half the land? Of course the agreement is reciprocal; and if Whitaker would be bound by it, the estate of Tompkins must be.

The alternative charge, therefore, was wrong; and the verdict of the Jury was not only contrary to the strong and decided weight of the evidence, but wholly without any proof to support it.

No. 111.—WILEY C. DENSON, et al. plaintiffs in error, vs.

JOHN F. PATTON, defendant.

[1.] A bequest to K to be held in trust for the use of Nancy C P during her natural life, does not create a separate estate in Nancy C P.

In Equity, in Floyd Superior Court. Decided by Judge TRIPPE, February Term, 1856.

Denson et al. vs. Patton.

This was a bill filed by Denson and several others, alleging that John C. Patton was trustee for Mrs. Nancy Patton, a married woman, and as trustee held certain property which had been bequeathed by the mother of Mrs. Patton to trustees for her use during life, and at her death to her daughter, Margaret Jane Patton; that complainants, upon the faith of the trust property (John C. Patton being insolvent) had furnished goods for the use and benefit of Mrs. Patton and of the negroes held in trust; that these debts were unpaid, and the trustee alleged that he had no power to sell any of the trust property, and could not otherwise pay them.

Complainants prayed that enough of the trust estate be sold to satisfy their demands.

On demurrer, the Court dismissed the bill, and this decision. is alleged as error.

UNDERWOOD; SHROPSHIRE, for plaintiffs in error.

ALEXANDER, for defendant.

By the Court.—Benning, J. delivering the opinion.

[1.] The plaintiffs insisted that John F. Patton, as successor to one A. Kennedy, held the slave, Cyrus, in trust for the separate use of Nancy C. Patton, his wife. This they insisted was the effect of a clause in the will of Jane Patton. That clause is in the following words: "And after the payment of just debts, I will and bequeath that the balance of my property be appraised and equally divided between my children hereinafter named, John Franklin Patton, William Washington Patton, Rebecca Amanda Patton, Edmund Lewis Patton, Sarah C. Patton. After one half a child's part is given my grand daughter, Margaret Jane Patton, and the other half of a child's part to A. Kennedy, his executors or administrators, to be held in trust for the use of Nancy C. Patton, during hernatural life," &c.

£ -, +:.

Mitchell vs. Printup.

Now it is clear that there is nothing in this clause which creates in Nancy C. Patton a separate estate in her share. (Hill on Trustees, 420.)

If not, then the whole interest in her share vested in John F. Patton, her husband.

If so, a bill against him as trustee, is not the way by which to reach that share. That share is not trust property, but is John F. Patton's own property, and is directly subject to his debts; and it may be reached at law by a fi. fa. against him.

We think, therefore, that the Court was right in holding that there was no equity in the bill.

No. 112.—Daniel R. Mitchell, plaintiff in error, vs. Daniel S. Printup, defendant.

- [1.] Where the verdict and judgment in trover is in the alternative, the defendant must elect either to deliver the property within the time prescribed, or pay the damages in money; and he will not be allowed to deliver in part and pay in part.
- [2.] A discrepancy between the verdict and judgment, which does not prejudice or affect in any way the rights of the defendant, is wholly immaterial; and an affidavit of illegality will not lie on that account.

Illegality, in Floyd Superior Court. Decided by Judge TRIPPE, December Term, 1855.

- D. S. Printup sucd D. R. Mitchell in an action of trover for seven notes of \$12 50 each, and one note of \$25 made by one Morris. The Jury found the following verdict:
- "We, the Jury, find for the plaintiff One Hundred and Fifty-six 105 Dollars, which may be discharged by returning the notes in twenty days.

ROBERT WOOD, Foreman."

Mitchell vs. Printup.

The judgment entered on this verdict described the notes as being "for rent," and had these words, "all to be delivered in twenty days." The defendant, within twenty days, delivered to the Clerk all the notes, except the twenty-five dollar note, for which he paid the amount due, principal and interest.

Execution having issued for \$156 15, defendant filed his affidavit of illegality, on the ground that the judgment varied from the verdict and from the declaration, by the insertion of the words above mentioned, and on the ground that he had complied with the verdict, by delivering seven of the notes and paying the amount due on the other.

The Court dismissed the illegality, and on this decision error is assigned.

ALEXANDER, for plaintiff in error.

UNDERWOOD, for defendant.

By the Court.-LUMPKIN, J. delivering the opinion.

- [1.] It is unquestionably a relaxation of the law and a privilege to defendants, to permit them to deliver up the property in discharge of the damages recovered against them in actions of trover. But the verdict being in the alternative, they must elect to do one or the other. They will not be allowed to deliver in part and pay in part. Such an indulgence, were it sanctioned, might and would be frequently and grossly abused. Hence, we affirm the judgment of the Circuit Court in dismissing this illegality.
- [2.] The discrepancy between the declaration, verdict and judgment is wholly immaterial. Mr. Mitchell does not deny but that the \$25 note was for rent. But whether he did or did not, that matter could only have become important, had Mr. Mitchell tendered a note of \$25 in discharge of the judgment, which was refused by Mr. Printup, because it did not purport to be for rent. It is not pretended that the defend-

Formby, guar. &c. re. Wood, guar.

ant offered any note, whatever, answering to this description. On the contrary, this is the identical note which he proposed to pay in money.

No. 113.—ELIZABETH FORMBY, guardian, &c. plaintiff in error, ve. WILLIAM WOOD, guardian, defendant.

[1.] An appeal may be entered by a lunatic in a period of sanity.

Motion, in Floyd Superior Court. Decided by Judge 'TRIPPE, December Term, 1855.

This was a bill in Equity, filed by Elizabeth Formby, as guardian of Jackson Formby, against John M. Hunt.

At February Term, 1852, upon petition of the defendant, representing himself as a lunatic, William Wood was appointed his guardian ad litem.

At August Term, 1853, the Jury rendered a decree in favor of complainant, from which an appeal was entered by Hunt himself, by affidavit sworn to by himself.

At December Term, 1855, a motion was made to dismiss said appeal, on the ground that a guardism ad litem, having been regularly appointed to defend for defendant as a lunatic, no appeal could be entered except by said guardian.

The motion to dismiss was over-ruled by the Court, and complainant excepted to that decision.

ALEXANDER; WRIGHT & SHROPSHIRE, for plaintiff in error.

UNDERWOOD, for defendant.

Formby, guar. &c. vs. Wood, guar.

By the Court.—BENNING, J. delivering the opinion.

[1.] If the appeal affidavit made by Hunt, was made duing a lucid interval, the act was valid.

"All acts done during a lucid interval, are to be considered as those of a person perfectly capable of contracting, managing and disposing of his affairs at that period; and this rule applies to wills as well as contracts." (Shelford Lunatics, 289; Hall vs. Warren, 9 Ves. 610.)

The office of the guardian ad litem, in the case of the lunatic, as in that of the infant, expires with the cause of it.

This being so, the question is, was the affidavit of Hunt made during a period of sanity?

And we think that the *prima facie* presumption to be made is, that it was.

"The reason why feoffments of infants and persons non compos mentis are voidable only, proceeds from the solemnity of livery of seizin which was anciently contracted corans paribus curtis, who signed their attestation to the same, which the law presumed they would not have done had the incapacity of the party been apparent." (Shelford Lunatics, 255.)

Hunt's affidavit was made before a Judge of the Inferior Court, and it was received by the Clerk of the Superior Court. Is it to be presumed that this Judge would have administered the oath, or that this Clerk would have received it, if the man making it were insane? We think not.

Besides, some inference in favor of sanity may be drawn from the nature of the very act imputed as the act of an insane man—the affidavit. It requires, I think, a good deal of sense to go to the making of that affidavit. It does not appear that Hunt had any Counsel in the Act. (Shelford Lunatics, 290.)

We affirm the judgment of the Court below.

Cunningham vs. Morris.

No. 114.—C. T. CUNNINGHAM, plaintiff in error, vs. WM. MORRIS, defendant.

[1.] A plaintiff in ejectment, in this State, is entitled to recover, together with the premises, all sums of money, by way of damages, both for mesns profits for the use and occupation of the land, and for trespasses committed during the same period. A recovery, therefore, in such an action, is a bar to an action of trespass Q. C. F.

Trespass, in Floyd Superior Court. Tried before Judge TRIPPE, December Term, 1855.

This was an action of trespass quare clausum fregit, brought by Cunningham against Morris.

Plaintiff, in making out his title to the land, offered in evidence a deed by B. T. Bethune to himself, made in Walker County, and attested by W. H. Battey and by W. H. Mitchell, signing himself "Notary Public, B. C." The deed was recorded in Walker County. Defendant objected to its being read without proof of its execution, and introduced A. B. Ross, who testified that the signature of the witness, Mitchell, was the handwriting of Walter H. Mitchell, who was a citizen of Baldwin County. The Court rejected the deed. Plaintiff then offered in evidence an original writ in ejectment, brought by him against defendant for the lot of land on which the trespass in this action is charged, with a count for mesne profits.

On the writ was the following confession of judgment:

"I confess judgment to the plaintiff for the premises in dispute, with costs of suit, and nothing for rents and mesne profits.

J. W. H. UNDERWOOD, Def'ts Att'y.

Aug. Term, 1853."

The plaintiff was then proceeding to prove the trespass alleged, when the Court, on motion of defendant, ruled that his testimony should be confined to trespasses committed since the said confession of judgment; whereupon, plaintiff suf-

Cunningham vs. Morris.

fered a nonsuit, reserving the right to except, and excepted to the said rulings of the Court.

ALEXANDER, for plaintiff in error.

UNDERWOOD, for defendant.

By the Court.—LUMPKIN, J. delivering the opinion.

[1.] The defendant in ejectment having confessed judgment to the plaintiff for the premises in dispute and costs of suit, "but nothing for rents or mesne profits," can the plaintiff, in an action quare clausum fregit, go behind this judgment and recover damages for the asportation of timber cut on the land?

Notwithstanding the cases in 1 Harris & Johnson, 408, and 2 Haywood, 381, seemingly to the contrary, we take it to be well settled, that as the action for mesne profits is an action of trespass vi et armis, the Jury are not confined in their verdict to the mere rent of the premises, although the action is said to be brought to recover the rents and profits of the estate, but may give such extra damages as they may think the particular circumstances of the case may demand. (Adams on Ejectment, 391.)

And accordingly, in *Morgan vs. Varick*, (8 Wend. 587,) the Court held, that inasmuch as the severance of machinery from the mill did not divest the owner of his property, that what was before part of the freehold, by the severance, became personal property, and the owner might recover for the property thus severed in an action for trespass in *mesne* profits.

This was an action of trespass for mesne profits and de bonis asportatis, to which the Statute of Limitations was pleaded. And Chief Justice Savage, in delivering the opinion of the Court, says: "It seems, indeed, unjust that the defendant should obtain tortious possession of the plaintiff's real estate, remove the buildings or timber," (the very injury com-

Cunningham va. Morris.

plained of in the case before us,) "which constituted, perhaps, the principal value, and secure himself from responsibility, by delaying the action of ejectment for six years," &c. And he decides, in conformity with the elementary principle cited from Adams, that the action for mesne profits is an action of trespass in which the plaintiff can recover for any injury done within the Statutory limit, which, in the State of New York, is six years.

The history of the action of ejectment casts light upon this Before the time of Henry VII, plaintiffs in ejectment did not recover the term; but until about that time the mesne profits were the measure of damages. Brush out of the mind, now, the fiction in which this action is veiled, and which makes it so terrific to the legal tyro, to-wit: the nominal plaintiff and nominal defendant, the casual ejector, the dramatis personæ, or actores fabulæ, and, as we before said, by the old law and the practice of the Courts, the plaintiff received nothing but damages, the measure whereof was the mesne profits; no term was recovered; but when it became established that the term should be recovered, the ejectment was moulded into the form of a real action. The proceeding was in rem; and the thing, itself, the term, only was recovered, and nominal damages, but not the mesne profits. And thereupon grew up and was established the present mode of recovering the mesne profits in an action of trespass, grafted upon the fiction in ejectment. And the present action is put in the place of the ejectment at Common Law, which was indeed a true and not a fictitious action, and in which the mesne profits only, and not the term, were recovered; for it was no other than a mere action of trespass. The plaintiff, in effect, says to the defendant, "you have turned me out of possession and kept me out, ever since the demise laid in the declaration; therefore, I desire to be paid the damages, to the value of the mesne profits which I lost thereby; this is just and reasonable."

And Mr. Justice Gould, in Goodtitle vs. Tombs, (3 Wils.

Printup vs. Mitchell.

121,) stated that he had known four times the value of themesne profits given by a Jury in this sort of action of trespass; and that if it were not sometimes so, complete justice could not be done to the party injured.

It may be that the very trespass complained of in this case, was necessary for using and cultivating the land and occupying the houses, and was done for that purpose; and consequently, would be included in an action for mesne profits for the use and occupation of the land, according to the most narrow and restricted views of the suit.

Being satisfied that the alleged trespass was intended to be included in the confession, and that by the rules of law it might have been recovered in that action; and inasmuch as the policy of this State is opposed to a multiplicity of suits, when the whole grievance may be, and now by Statute must be, settled in one, we hold that the plaintiff is not entitled to the right which he is seeking to enforce.

A similar construction has been put, by the Courts of England, upon the Statute passed by the British Parliament during the reign of George IV, inhibiting, as our Act of 1834 does, a separate suit for mesne profits. The plaintiff there recovers, together with the premises in dispute, all such sums of money, by way of damages, to which he is entitled on account of the disseizin.

No. 115.—JOSEPH J. PRINTUP, plaintiff in error, vs. DANIEL. R. MITCHELL, defendant.

^[1.] At one term of a Court, a judgment was rendered against a party to which he did not except. At the next term, he moved that a different judgment should be entered, nunc pro tunc, in place of that judgment: *Held*, that the motion was properly over-ruled.

Printup rs. Mitchell.

[2.] Continuances for "Providential causes," are not to be charged against either party.

Motion, in Floyd Superior Court. Decided by Judge TRIPPE, December Term, 1855.

In this case, on the same being called in its order, plaintiff moved to charge against the defendant on the docket, a continuance which had been granted at the preceding term, and which the plaintiff had then insisted should be charged to him, but which was not charged to him on the docket. The Court refused the motion.

The plaintiff having announced himself ready, the defendant moved a continuance from Providential cause, on account of the absence of Warren Akin, Esq. one of his Counsel, from sickness.

The plaintiff not resisting the continuance of the case insisted, that as Mr. Akin was not the leading Counsel for the defendant, and as he had other Counsel, that the continuance should be charged to the defendant.

The Judge remarking that he knew the value of Mr. Akin's services in the case, and that he knew, personally, of his sickness, refused so to charge it, saying that it was the practice of that Court not to charge continuances for Providential cause.

To all these rulings of the Court, plaintiff excepts.

UNDERWOOD, for plaintiff in error.

ALEXANDER, for defendant.

By the Court.—Benning, J. delivering the opinion.

In respect to the continuance first granted, it seems that the plaintiff, at the time when it was granted, insisted that it should be charged against the defendant, but that the Court charged it against neither party. This was a decision. Holcombe ss. Roberts.

And if it was an erroneous one, and the plaintiff wished it corrected, he should have excepted to it and brought it before this Court, within the regular time allowed by law. No excuse is offered for the failure to bring the case, thus, before this Court.

The motion made at the next term, to have the continuance charged nunc pro tunc against the defendant, and the exception to the refusal of the Court to grant that motion, were but an attempt to bring the decision of the preceding term in review before this Court. That is what they amount to.

[1.] Such a motion the Court was, of course, right in refusing.

Ought the second continuance to have been charged to the defendant?

[2.] We think not. The ground of that continuance, was the absence of Mr. Akin, one of the Counsel for the defendant, and Mr. Akin's absence was occasioned by illness; that is, the ground was "Providential." And the Act of 1854 declares, that continuances for Providential cause, shall not be charged against either party. (Acts of 1854-'52.)

No. 116.—WILLIAM HOLCOMBE, plaintiff in error, vs. GEO. W. ROBERTS, defendant.

- [1.] All actions of slander may be brought under Jones' Forms; and the writ or complaint will be deemed and held to be sufficiently technical and full, provided it be in the terms of the Act. Every thing else necessary for the maintenance of the action, may be supplied by the proof.
- [2.] In slander, under Jones' Forms, the omission of colloquium is no good ground in arrest of judgment after verdict.
- [3.] A party suing out a bill of exceptions, is not strictly entitled to a supersedeas until the bill of exceptions is filed; still, where irreparable injury may result, by carrying the judgment of the Circuit Court instantly into effect, reasonable time should be allowed to make out the bill of exceptions.

Holcombe vs. Roberts.

Motion, in Floyd Superior Court. Decided by Judge TRIPPE, December Term, 1855.

This was a motion in arrest of judgment. Holcombe had sued Roberts for slanderous words. The action was brought in the form prescribed in the Act of 1849-'50, "to curtail and simplify pleadings." The words charged were, "he has sworn a d—d lie and I can prove it." There were no other allegations in the declarations.

The Jury returned a verdict of \$1.000 for the plaintiff.

The defendant moved in arrest of judgment, on the ground that the words charged are not actionable per se, and the declaration contains no averment to make them so.

The Court sustained the motion and arrested the judgment. While the motion was pending, the security of Roberts (who had been held to bail in the action) came into Court and delivered him up; and when the Court decided the question, plaintiff requested that the defendant might not be discharged until he could make out a bill of exceptions, to take the decision to the Supreme Court. The Court refused the application and discharged the defendant, and both these decisions are alleged as error.

WRIGHT & SHROPSHIRE, for plaintiff in error,

ALEXANDER, for defendant.

By the Court.—LUMPKIN, J. delivering the opinion.

The proof having been allowed as to the colloquium in this case without objection, we are not prepared to say but that the motion in arrest of judgment came too late, even at Common Law.

[1.] In Hawks against Patten, decided at Milledgeville, this Court held that it was not error in the Circuit Judge to allow an action of slander under Jones' Forms, to

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Holcombe vs. Roberts.

be amended by supplying the colloquium. But we thought then, and so hold now, that no such amendment was necessary. It was unquestionably the intention of the Legislature to authorize all actions of slander to be brought under the forms prescribed by the Statute; and if this be so, then, according to the repeated adjudications of this Court as to the proper construction of the Act of 1849-'50, it is only necessary for the plaintiff to declare according to the form dictated by the law, and every thing else may be supplied by the proof.

[2.] It is rather amusing to see defendants affect such profound ignorance of the cause of complaint against them, and for which they are summoned to Court, because, forsooth, the colloquium is left out of the writ! especially after verdict, when the whole matter has been brought out by the evidence! No such particularity is exacted, even in criminal pleadings.

[3.] As to the discharge of the defendant by the Court, we can only reiterate what this Court said in Lindsey vs. Lindsey, (14 Ga. Rep. 657,) namely: that a party suing out a bill of exceptions is not entitled to a supersedeas until the bill of exceptions is filed; still, we recommended, in strong language, to the Courts, to allow a reasonable time for the bill of exceptions to be made out before the judgment of the Circuit Court is carried into effect, provided irreparable injury may otherwise result.

The last Legislature failed to supply this casus omissus in the Act of 1845 organizing this Court.

Hillburn vs. Obarr.

No. 117.—L. J. HILLBURN, plaintiff in error, vs. ROBERT O'BARR, defendant.

- It is not an error for the Court to refuse to express an opinion to the Jury, as to which of several possible inferences of fact is the true one.
- [2.] A carpenter being entitled to a claim of lien against the interest of one of several joint owners, asserted it against all: *Held*, that the claim was good against the interest of the one.

Action, in Floyd Superior Court. Decided by Judge TRIPPE, December Term, 1855.

This was an action to enforce a carpenter's lien, under the Act of 1837. It appeared that W. T. Cothran, G. S. Black, J. R. Powell and L. J. Hillburn, being the joint owners of a lot in the town of Rome, made a contract with the said Hillburn, (one of themselves,) to build a hotel on said lot. Hillburn employed O'Barr, who was a carpenter, to work on the house.

The work was completed December 25th, 1850.

On the 8th of March, 1851, O'Barr filed in the Clerk's office, the following notice:

"GEORGIA, FLOYD COUNTY:

Robert O'Barr, carpenter, claims an incumbrance on the house, and premises on which it is erected, of George S. Black, Lemuel J. Hillburn, W. T. Cothran and James R. Powell, known as the Hillburn House, and the lots in the City of Rome on which said house is situated, adjoining Broad St. on the north-west, and Howard St. on the south-east; also, adjoining the lots or lands of George S. Black and Alfred Shorter, for the building of said house.

Signed, ROBERT O'BARR. Recorded March 8th, 1851.

On the 17th day of May, 1851, Obarr took from Hillburn

Hillburn es. Obarr.

a promissory note, due the 25th December thereafter, for the amount due him for said work, \$546, 0.5. On the 30th December, 1851, O'Barr commenced his action to enforce said lien against the house.

On the trial, the defendant made the following points:

1st. That the debt was due when the work was completed; and therefore, this action was not commenced within one year thereafter, as required by the Statute.

2d. That the Act only gave a lien to original contractors, and not to persons employed by the contractors.

3d. That the lien recorded, was a lien on the whole house; and therefore, improperly filed, as plaintiff had made no contract with any of the owners except Hillburn.

4th. That the lien filed cannot be construed so as to refer o and cover Hillburn's interest alone.

All which points the Court over-ruled, and charged the Jury, that the time that the debt was due, was a fact for them to determine; that the date of the note, or the maturity of the note, was evidence of when the debt was due, as well as the completion of the work; and it was for them to say, from all the evidence, whether the action was commenced within a year from the debt becoming due; that Hillburn, being a part owner, the lien of plaintiff attached on his interest; and that the notice recorded was sufficient to cover that interest.

The Jury found for the plaintiff, to be collected from Hillburn's interest in the house, and Counsel for defendant excepted to said rulings of the Court.

SHROPSHIRE, for plaintiff in error.

ALEXANDER, for defendant.

By the Court.—Benning, J. delivering the opinion.

The time when the work was to be paid for, was a question for the Jury. And there was evidence from which the Jury

Hillburn vs. O'Barr.

might have inferred it to have been, either the time when the work was completed, the time when the note was given, or the time when the note fell due.

[1.] Therefore, if the Court had told the Jury that this time was the time when the work was completed, the Court would have expressed its opinion on matter of fact. And that is a thing which the Court is forbidden to do. (Cobb's Dig. 462.)

So much for the plaintiff's first point.

The Court charged, "that Hillburn being a partner, the lien of plaintiff attached on his interest; and that the notice recorded was sufficient to cover that interest." Was this charge right?

Why not? May not one joint tenant bind his interest by contract? No doubt he may.

Therefore, if one joint tenant employ a carpenter to build a house on the land held in joint tenancy, he subjects his interest in the land to the chance of having fastened upon it the carpenter's lien. (Cobb's Dig. 555.)

Hillburn did this. And O'Barr, the carpenter employed by Hillburn, entered a claim of lien, which was expressed to be against "the house and premises on which it is erected, of George S. Black, Lemuel J. Hillburn, W. T. Cothran and James R. Powell."

Was this such a claim of lien as bound Hillburn's interest?
[2.] Admit that this is a claim of lien against the interest of all the joint owners; yet, what law is there that says, if a man's claim exceed his right, not the excess of the claim merely, but the whole of the claim, is void. The reverse is, in general, true. And no authority is cited to show this case an exception to the general rule.

V'e think, therefore, that this charge of the Court was rig!

I it if it was, then it is clear that the Court was right in the disposition which it made of the other three of the plaintiff a points.

VOL XIX-75

Thompson vs. Richards et al.

So far as his interest was concerned, Hillburn was and original contractor" with O'Barr.

No. 118.—Alexander Thompson, plaintiff in error, vs. Joseph R. Richards et al. defendants.

- [1.] The deed of a person to land, where there is adverse possession held by another, being void under the 32 Henry VIII. does not preclude the grantee from maintaining an action of ejectment in the name of the grantor, to recover possession of the premises.
- [2.] A demurrer will lie to a bill, where there is an ample Common Law remedy.

In Equity, in Carroll Superior Court. Decision by Judge-Bull, February Term, 1856.

This was a bill filed by Thompson, setting forth that in-Feb. 1853, an action of ejectment was commenced against him, on the several demises of William, Peter and John Manley, heirs at law of Wm. Manley, dec'd, and of J. R. Richards and of John and B. M. Long, to recover a certain lot of land, which action is still pending, one verdict having been rendered for plaintiffs for three-fourths of said lot; that plaintiffs showed a grant from the State to the Manleys; a deed from them to Richards, and from him to the Longs; that complainant holds under a deed from Samuel Bowlin, dated in 1850; that Bowlin had been in possession under color of title since 1841; and those under whom he claimed, since 1831; that Bowlin, while in possession, had sometimes. said, while drunk, that he did not claim the land, which raised a doubt concerning complainants' title; that he bought in good faith, believing the title to be good; that the conveyance of the land from the Manleys to Richards, and from

Thompson vs. Richards et al.

Richards to the Longs, were made while complainant was in adverse possession of the land, and had been for more than a year previous, of which the said Longs had full knowledge, and which complainants cannot show their knowledge of, but by a resort to their consciences; that the Manleys and Richards had no knowledge of the bringing of the ejectment suit, but that the same is proceeding for the sole benefit of the Longs. The complainant therefore charged that the deed to said Richards and the Longs is void in law; and he prays a perpetual injunction against said ejectment.

The bill was demurred to on the two grounds, of a want of equity, and that there was an adequate Common Law remedy. The Court sustained the demurrer and dismissed the bill, and on this decision error is assigned.

Powell, for plaintiff in error.

WRIGHT, for defendants.

By the Court.-LUMPKIN, J. delivering the opinion.

[1.] This case was before this Court at Decatur, August, 1854, (16 Ga. R. 440,) and we held there was no equity in the bill. It presents no new feature. We see, therefore, no reason to over-rule the decision then made.

[2.] It is straining pretty hard, perhaps, to adopt the 32 Henry VIII. in a new country like this has been; and we feel no disposition to relax the rule which allows the grantee, whose deed is made void by that Statute, to use the name of his grantor to recover the premises.

Rogers, Ketchum & Grosvernor vs. Bowen & Bros.

- No. 119.—Rogers, Ketchum & Grosvernor, plaintiffs'in error, vs. Bowen & Bros. defendants. Gilliland, Howell & Co. plaintiffs in error, vs. Bowen & Bros. defendants.
- [1.] W B as agent for J B, took it upon himself to acknowledge service of two suits against J B—the latter confessed judgments in the suits. Afterwards, he moved to set aside the judgments, on the ground that he had not had service; and the Court granted the motion: Held, that the Court erred.

Motion, in Carroll Superior Court. Decided by Judge Bull, December Term, 1855.

These were motions to set aside judgments obtained heretofore by the plaintiffs in error, against Bowen & Bros. The
motions were made, on the ground that John Bowen, the only
member of the firm residing in the county, had never been
served with the writ and process. There was an acknowledgment of service on the writ by William Bowen, as Attorney in fact for John Bowen; and the authority of William
Bowen to make it was denied and not proved. John Bowen
had confessed judgment on the writ, in the name of the firm.
The Court sustained the motion and set aside the judgments,
and the plaintiffs excepted.

BUCHANAN & McKinley, for plaintiffs in error.

Bowen, for defendants.

By the Court.—Benning, J. delivering the opinion.

[1.] It appears that in these two cases, William Bowen took it upon himself to acknowledge service of the declaration and process, as agent for John Bowen, and that John Bowen afterwards confessed judgments in the cases.

Does this furnish sufficient evidence that John Bowen was served with the declaration and process? We think it does.

Johnson, Governor, vs. Goddard et al.

Every ratification of an act is equivalent to an authorization of the act. This is a general principle.

The confessions of judgment by John Bowen were ratifications of the acknowledgments of service by Wm. Bowen. A ratification may be by acts as well as by words.

But if the service was sufficient, the judgments were good. And, therefore, it was error in the Court to set them aside.

No. 120.—H. V. JOHNSON, Governor, plaintiff in error, vs. JAMES B. GODDARD et al. defendants.

[1.] A clerical mistake or omission, in the direction of a scire facias, is amendable.

Scire facias, in Carroll Superior Court. Decision by Judge Bull, December Term, 1855.

This was a scire facias issued on a penal bond, for the appearance of a party charged with crime.

The scire facias was objected to, because it was directed "To the Sheriff of said State, Greeting."

The Solicitor General moved to amend, which the Court refused, and dismissed the scire facias.

To both decisions the Solicitor General excepts.

BLECKLEY, Solicitor General, for plaintiff in error.

By the Court.—LUMPKIN, J. delivering the opinion.

[1.] The Act of 1852 (Pamphlet Laws, 234) requires, that all writs of scire facias shall be directed "to all and singular the Sheriffs of the State of Georgia." Is a direction "to the

Johnson, Governor, vs. Goddard et al.

Sheriffs of said State" sufficient? And if not, is it amendable?

For myself, I should read the direction in the plural: "to the Sheriff's of said State;" and then it would undoubtedly be good. But suppose it be in the singular, "Sheriff," is it amendable?

Mr. Tidd, in his work on Practice, remarks, that it had been said that a scire facias was not amendable. But he continues, "There are cases in the books where writs of scire facias had been amended by the Courts, not only where it was had on the face of it, by the mistake of the Clerk, but also for other causes." And he concludes by saying, that "it seems now to be settled, that the power of amending writs of scire facias, is discretionary with the Courts." (2 Volume, 1123.)

The Judiciary Act of 1799 (Cobb, 1136) declares, amongst other things, that "no process, judgment or other proceeding, in any civil cause, shall be abated, arrested, quashed or reversed for any defect in matter of form, or for any clerical mistake or omission, not affecting the real merits of the cause; but the Court, on motion, shall cause the same to be amended, without any additional cost, and shall proceed to give judgment."

And finally, the great Act of Jeofails of 1853-'4, (Pamphlet Laws, 48,) allows pleadings to be amended at any stage and in all respects, whether in matter of form or substance.

Has not the people of Georgia resolved that every cause shall be tried upon its merits? And shall the Courts undertake or struggle further to arrest or obstruct this wise and beneficent policy, inaugurated by the Constitution of 1777, and steadily pursued ever since?

By a Statute of the last Legislature, a party is allowed even to amend his attachment as to the bond, return of the officer, &c. And it is provided in that Act, that the singular number shall include the plural. (DeGraffenreid's Dig. 19, 20.) Shall we, because of the omission of a little "s," if, indeed, it be omitted, force the law-makers to tax their

Goodson et al. vs. Cooley.

ingenuity still further, and waste the time and money which might be so much better employed, in putting a stop to quibbling?

No. 121.—Cordy Goodson et al. plaintiffs in error, vs. Bry-ANT Cooley, defendant.

- [1.] Under the Act of 1820, if not at Common Law, suits may be maintained at Law between partners.
- [2.] A being the debtor of B stipulates with C to discharge the debt: Held, that B being no party to the contract, it does not change the relation of A to B—constituting A security only to the debt.
- [3.] B being a mortgage debtor of A, agrees with C, upon sufficient consideration, namely: the transfer of the mortgaged property, to discharge the liability. C failing to comply, the mortgage is foreclosed and the property sold: Held, that no right of action accrues to C to recover back of B the amount paid by C on the debt, by way of damages.

Assumpsit, in Newton Superior Court. Tried before Judge STARKE, September Term, 1855.

This was an action brought by three of the Goodsons, to-wit: Cordy, Joseph and John B. against Bryant Cooley. The declaration stated that Cooley had bought from one King a stock of horses and vehicles, for which he gave his note for \$3.000; that he engaged plaintiffs to keep a livery stable, on an agreement that if they would manage it and pay off the note held by said King, that said stock should belong to them; that they had gone on and paid \$1.200 by their care and labor in said livery stable, and were going on to pay the remainder, when Cooley induced King to foreclose a mortgage he had given on the stock to secure said notes, and it was sold.

Goodson et al. vs. Cooley.

The plaintiffs claimed to recover this \$1.200. On the trial, King testified that the agreement between Cooley and the Goodsons was, as stated by plaintiffs, except that when the notes should be paid off, the stock was to belong to them all in four equal shares. Other witnesses testified to having heard Cooley say that he had nothing to do with the stock; that it was for the Goodsons, whenever said notes were paid.

The defendant moved for a non-suit, and the Court granted it, on the ground that if Cooley was to have a share in the stock when paid for, then they were partners, and the action would not lie; and that if they were not partners, then Cooley would be considered, in Equity, as security for the Goodsons on said notes; and therefore, had a right to notify King to collect the same; and in the absence of evidence as to when the Goodsons were to pay said notes, it must be taken that they were bound to pay them when due; and if not paid it was their own fault.

To which judgment of non-suit plaintiffs except.

CLARK & LAMAR, for plaintiffs in error.

FLOYD, for defendant.

By the Court.—LUMPKIN, J. delivering the opinion.

A non-suit was awarded by the Court in this case on three grounds:

[1.] Because the facts proven constituted a partnership between the plaintiffs and defendant; and consequently, an action at Law did not lie. 2. That if they did not, the defendant would be considered, in Equity, as the security of the plaintiff; and therefore, if King had not proceeded to foreclose the mortgage when directed by Cooley, Cooley would have been released from the debt; and lastly, that in the absence of any evidence, showing at what time the plaintiffs were to pay for the stock, the legal presumption was that it

Goodson et al. vs. Cooly.

was to be at the maturity of the note given by Cooley to King for the purchase money of the property bought by Cooley of King and sold to the plaintiffs and that if the Goodsons failed to discharge the debt, and thus lost the benefit of their contract, it was their own fault, and they had no right to recover of the defendant. We think the first ground upon which the judgment of non-suit was put of more than doubtful propriety.

- [2.] We are clear that the second, as to the relation of security existing between the parties, so as to affect King's rights, without his being a party to the agreement, was wrong.
- [3.] And equally well satisfied that the plaintiffs were not entitled to maintain this action against the defendant; knowing of the mortgage, the Goodsons stipulated to pay the debt. If they neglected or refused to do so, and the property has been sold under the foreclosure, whom have they to blame but themselves?

It is argued, and the suit for damages is brought upon this idea, that the plaintiffs have paid twelve hundred dollars of the defendant's debt. True, but it was out of the profits of the property, after making a support for themselves in the meantime. Suppose the whole of the horses, or a large portion of them, had perished with distemper or by some other casualty! It is in evidence that this property was the only means by which they could fulfil their undertaking! table loss would have resulted to Cooley. As it was, it was becoming daily more valueless. The risks run by Cooley constituted a very sufficient consideration, in Equity as well as at Law, for the agreement, on the Goodsons part, to settle King's claim, as well as for the money actually paid by them out of his property.

It may have been morally wrong in Cooley to instigate King to coerce the collection of his debt; still, neither he nor King did any more than they had a right to do. The Goodsons had stipulated to pay the debt at maturity, and could not complain at being compelled to do so. Cooley, looking to the

VOL. XIX-76

McCord, caveator, vs. McCord, propounder.

depreciation of the horses and carriages, might have been influenced by a laudable desire only to save himself.

No. 122.—John McCord, caveator, plaintiff in error, vs...
James R. McCord, propounder, defendant.

[1.] A marriage settlement contained this clause: "That each of the parties aforesaid shall, after marriage and through life, keep, have and enjoy, to their own separate use, benefit and behoof, all such worldly estate, whether real or personal, as either of them may possess or be in any wise legally entitled to; and to be managed by them separately if they choose, and in no wise to be subject to the control, debts, mortgages, judgments or incumbrances of the other party; and each to have a sole and separate control of their own estate, which they have before the solemnization of the marriage aforesaid:" Held. that by it the woman reserved to herself the power of disposing, absolutely, of her property by will.

Caveat, in Butts Superior Court. Tried before Judge STARKE, September Term, 1855.

James R. McCord propounded the will of Sarah McCord, a married woman, which was resisted by her husband, John McCord; and the only question was, whether, under the following ante-nuptial agreement, she had the power to dispose of her property by will. The agreement is as follows, after reciting that a marriage was in contemplation between the parties: "That each of the parties aforesaid shall, after said marriage, and through life, keep, have and enjoy, to their own separate use, benefit and behoof, all such wordly estate, whether real or personal, as either of them may possess, or be in any wise legally entitled to; and to be managed by them separately, if they choose, and in no wise to be subject to the control, debts, mortgages, judgments or incumbrances of the other party; and each to have a sole and separate

McCord, caveator, vs. McCord, propounder.

control of their own estate which they have before the solemnization of the marriage aforesaid. Interchangeably signed, sealed and delivered," &c.

Signed and scaled by John McCord and Sarah Alexander, afterwards Sarah McCord, and duly attested.

The Court held, and so charged the Jury, that under this instrument, Mrs. McCord had the right to dispose of her property by will.

The Jury found for the propounder, and the caveator excepts to the decision of the Court.

D. J. BAILEY, for plaintiff in error.

FLOYD, for defendant.

By the Court.—Benning, J. delivering the opinion.

[1.] The question is, whether Mrs. McCord, a married woman, had power to make the will which it appears that she did make? That depends upon the degree of power which she reserved to herself by the marriage settlement which she entered into with James R. McCord.

It is clear that the estate which she reserved to herself in her property, was as much as a separate estate for her life.

Did she reserve a separate power over more than a life estate in the property? This is the important question.

We think she did. We think she reserved all power over it. The last clause in the settlement is in these words: "And each to have a sole and separate control of their own estate which they have before the solemnization of the marriage aforesaid."

There can be no doubt that we are right in this opinion, if the word "which" has the word "control" for its antecedent.

And unless it has, there can be no use for the clause. Unless the clause means to say that the control which each party was to have, was to be the same which such party had before marriage, it adds nothing to the previous part of the

instrument; for the clause can have but one other meaning, and that is this: that as to such "estate" as each party had before marriage, such party is, during life, to have the sole and separate control of it. But this is a meaning most fully conveyed in the previous part of the instrument, which gives to each party a sole and separate estate in such property for life.

The word "which," then, must be construed, we think, as referring, not to the word "estate," but to the word "control," for its antecedent.

If so, it follows that Mrs. McCord reserved to herself the power to make this will; for it follows that she reserved to herself all the "control" over her estate which control she had before marriage. And a feme sole has all power over her estate.

No. 123.—DISKIN HOLCOMBE, plaintiff in error, vs. ALFRED AUSTELL and others, defendants.

[1.] Possession cannot give title under the Statute of Limitations, if the possession is not continuous and adverse.

Ejectment, in Fayette Superior Court. Tried before Judge Bull, March Term, 1855.

This was an action of ejectment brought in 1850, by Alfred Austell and others, against Diskin Holcombe. The plaintiffs showed the grant from the State to John Arlines' orphans, dated November 24th, 1823; deed from James Arlines to Jer. Walker, February 2d, 1829; deed from Ann Davis to Diskin Holcombe, 23d October, 1887; fs. fa. Riias Bell vs. Diskin Holcombe and another, and levy on the lot,

and sale, and deed by the Sheriff to William McBride, November 7th, 1843; deed from William McBride and Alfred McBride to the plaintiffs, 16th November, 1849.

It was shown that Holcombe, the defendant, lived on an adjoining lot, and had a still-house on this lot, where he stilled peaches in the season, from 1837 to 1846, when he moved away, and in December, 1849, he moved on to this lot, where he built a house, and has lived there ever since; that before 1849 he had no clearing or improvement on No. 52, (the lot in dispute,) except the erection for the still.

Plaintiff proved that John Arlines had nine children, three of whom were minor orphans, and drew the lot, to-wit: Jethro, Mary and Martha; that Mary and Martha died unmarried, and that the surviving children are Henry, Jesse, James, Jethro and Sarah, now Mrs. Glass, besides their mother, Phereby, now Mrs. Williams.

The plaintiffs then introduced a note made by Holcombe to William McBride, for rent for this lot, (No. 52,) and another, dated October 1st, 1844.

Plaintiffs having closed, defendants introduced deeds of quit claim of their interest in said lot, from Jesse and Jethro Arlines, and from James Glass, who married Sarah, and from Mrs. Williams, to Isaac Holcombe, dated in 1853.

Defendant proved by the former Sheriff, that when he made the levy on the lot on Bell's ft. fa. he entered the levy as No. 53; that on the day of sale, he was told that the No. was 52, and he declined to sell it; that no other levy was made, but the entry was altered, and the land was re-advertised and sold; that William McBride, on the day of sale, told him (the Sheriff) that he was buying the lot for Holcombe, and hoped no one would bid against him.

Holcombe was in town, but witness is not certain that he was present at the sale, but thinks he was.

ABNER COKER, a Constable, testified: That in July, 1850, Andrew McBride gave him a f. fa. against Holcombe, and directed him to levy on this lot as Holcombe's property.

Plaintiff in rebuttal, introduced the answers of JETHRO

ARLINES, who testified: That in 1853, a man who, he heard, was named Holcombe, who said that his father owned this lot, and that he wanted the title strengthened, and asked for a quit claim deed from him; that he, "having no interest or claim whatever to said land, gave him a quit claim deed, and his brothers and mother did the same.

To the words "he having no interest or claim whatever to said land," in these answers, defendant objected, on the ground that the witness was estopped by his deed from denying an interest.

This objection was over-ruled by the Court, and this is alleged as error.

The Jury having found for the plaintiffs, defendants moved a new trial, on the ground that the verdict was contrary to law and to the evidence, and because the Court admitted the portion of Jethro Arlines' testimony, objected to as above stated.

The new trial was refused by the Court, and this decision is alleged as error.

EZZARD & COLLIER, for plaintiff in error.

STONE, for defendant.

By the Court.—BENNING, J. delivering the opinion.

[1.] Was the verdict contrary to the evidence? It was, unless the plaintiff showed title in himself. Did he show title in himself?

The plaintiff attempted, in two ways, to show title in himself: by a chain of conveyances down to himself from the drawers, and by the Statute of Limitations.

In respect to the first way, he succeeded in showing a grant from the State to John Arlines' orphans, and a deed from James Arlines to Jer. Walker, but he failed to show any deed from Walker to any person, or any other deed from an Arlines or the heir of an Arlines, to any person. He

showed a deed from Ann Davis to Diskin Holcombe, but he left a chasm between Ann Davis and Walker—between Ann Davis and the Arlines.

The plaintiff failed, then, to show title in himself, in the first way, by a chain of conveyances from the drawer down to himself.

Did he show title in himself by the Statute of Limitations? This question may be resolved into this: was the possession or possessions of Diskin Holcombe such as perfected title in McBride and those claiming under him, by virtue of the Statute of Limitations? For Holcombe was the only person who ever had any actual possession of the lot; and McBride bought it at Sheriff's sale as his property.

And the answer to this question must be no.

The first possession of Holcombe was not continuous; and such as it was, it was that of a trespasser—a mere squatter.

And the possession of a mere trespasser, is to be deemed to be a possession in subordination to the right of him who has the true title. (Ang. Lim. Ch. 31, §5.)

This possession, too, was confined to the mere spot where the still stood, or to the spot on which the still-house stood.

This first possession, then, of Diskin Holcombe, was not sufficient to clothe him with title under the Statute of Limitations; and therefore, was not sufficient to clothe those claiming under him with such title.

And as to his second possession, it does not appear that that was a possession which he held under any of the plaintiff's lessors; and if that appeared, it would do the plaintiff no good, as the possession was, in itself, of less duration than seven years; and there was no other sufficient possession with which it could be connected, to make up the seven years. Indeed, a chasm of three years intervened between it and the previous possession, such as that was of Diskin Holcombe.

All which being so, we think that the verdict was contrary to the evidence; and therefore, that the Court below should have granted the motion for a new trial. Elam vs. Lewis.

No. 124.—Samuel C. Elam, plaintiff in error, vs. William A. Lewis, defendant in error.

[1.] The bar of Georgia are not privileged from arrest under ca. sa.

Ca. sa. in Fulton Superior Court. Motion to discharge defendant. Decided by Judge Bull, October Term, 1855.

William A. Lewis sued and obtained a judgment against Samuel C. Elam, a practising Attorney in the several Courts of Law and Equity in this State. A ca. sa. was issued from the judgment, and the defendant, was arrested under it and gave bond for his appearance at Court.

When the cause was called, Counsel for defendant moved to discharge the defendant on the ground "that a practising Attorney of the several Courts of Law and Equity in said State of Georgia, is not liable to arrest and imprisonment upon mesne or final process in civil causes, and may be discharged upon motion.

The Court over-ruled the motion, and Counsel for defendant excepted.

BLECKLEY, for plaintiff in error.

SIMPSON; HARRIS, for defendant.

By the Court.—LUMPKIN, J. delivering the opinion.

[1.] That by the Common Law, Attorneys are privileged from arrest, either on mesne or final process, there can be no doubt. And the books show that New York, New Jersey and other American States, recognized their right to this exemption in this country. But the fact that no such claim has ever been set up here, is, of itself, conclusive against its validity.

By the Constitution, members of the General Assembly

Elam vs. Lewis.

are protected from arrest during their attendance upon the Legislature, and for ten days before and after. If it required the organic law to effect this, the implication is strong against its existence in the present case. If the objection to this arrest Le valid, the principle goes much further—even to the extent of holding that Attorneys are not liable to be sued by ordinary process, but by bill. Neither are they amenable to bail process; for such is the equally well established doctrine of the Common Law. Who, in this State, is prepared to carry out this doctrine to all the consequences to which it necessarily leads? It will exempt Attorneys from all public duties whatever, requiring personal service! (See Cerard's Case, 2 W. Blackstone's R. 1123.)

There is an essential difference in the relation which the profession sustains, both to the Courts and the public, in England and in this country. I need not point it out. There Attorneys are regulated by Statute, and are subject to many restrictions, having a rate of fees settled, either by Statute or established usage, and required to be fixed by the taxation of an officer of the Court. No such regulations are known here; their employment is matter of contract.

Suppose the proposition were announced, that an Attorney in Georgia could not maintain a suit for his fees? That his business or profession by which, like the merchant and the mechanic, he earns the daily bread for himself and his family, is so much more honorable than the calling of other members of the community, as to prevent him from enforcing payment for a fair compensation for his services on that account? Would not such an idea be wholly inconsistent with our notions of equality? And yet, it is the established law of England, that a Counsellor or Barrister cannot maintain an action for his fees.

Any decision which separates the bar from the people, in sympathy or identity of privileges, would prove one of the greatest curses which could be all the profession. From the

Elam vs. Lewis.

day when it is made, the bar itself will receive an impulse dewnwards in the eyes of the community.

On the bill before Parliament to exempt the servants of Peers from arrest, Lord Mansfield said, that he was neither a good servant nor an honest man who would contract debts which he was either unwilling or unable to pay. A man may be unfortunate, but thank God he cannot be imprisoned, inthis State, except for crime. A good character is the shield of Zeus, with which an honest man may ward off the assaults of the most hard-hearted creditor. We owe it, therefore, to the people at large, as well as to a high-minded and honorable bar, to affirm the judgment of the Circuit Court.

We would not say, that if an Attorney be taken on a ca. sa. while in attendance on the Court and actually engaged in transacting the business of his client, that he would not be The suitor, himself, if conducting his own cause. undoubtedly would be; and by the Constitution, he is entitled to appear personally or by Attorney. Witnesses are exempt, because the public justice of the country must override private interests. For the same reason, and upon gen-eral principles, Clerks, Sheriffs and Judges, themselves, could: not be arrested during the sitting of the Court, for the sake of suitors and the public interest. These trusts are confided. under the law, by the people, to particular agents; and when obstructed, cannot be executed by others. It is but seldom, if ever, known that the same reasons apply to Attorneys. rarely occurs that the duties committed to them may not be discharged by others.

We might, perhaps, notwithstanding the concession in the beginning of this opinion, have put the judgment in this case on narrower grounds, and have held, that it was an exception to the rule that Attorneys are privileged from arrest; for it is stated upon old and highly respectable authority, that an Attorney shall not have his privilege when sued by another Attorney, if both be of the same Court. (2 Roll. Abr. 274; Barnes, 25; 2 Modern, 298.) It is admitted that Mr. Lewis is an Attorney as well as Mr. Elam. But we preferred that.

The Justices, &c. vs. Yoakum.

so extensive a question should be determined upon the broad foundation, that the general justice of the country should alike pervade all ranks and professions.

No. 125.—The Justices of the Inferior Court of Fulton County, plaintiffs in error, vs. Madison S. Yoakum, defendant in error.

.[1.] The tax receivers are not entitled to any commissions on the county tax.

Mandamus, in Fulton Superior Court. Tried before Judge Bull, October Term, 1855.

This was an application filed by Madison S. Yoakum, former receiver of tax returns for Fulton County, praying for a mandamus against the Justices of the Inferior Court of said county, commanding them to grant an order directed to the County Treasurer, requiring him to pay over to the petitioner, as the Receiver of Tax Returns of said County, for the year 1854, five per cent. upon the county tax as his commissions.

The Justices of the Inferior Court filed their answer to the mandamus nisi, admitting that the plaintiff had applied for an order on the County Treasurer for his commissions on the county tax, which they had refused to grant, alleging that in their opinion, under the law, he was not entitled to receive any commissions upon the county tax.

The Court, after hearing argument of Counsel, decided that the plaintiff was entitled to receive commissions on the county tax the same as the Tax Collector, and directed the Justices of the Inferior Court to issue an order in his favor on the County Treasurer for the five per cent. claimed.

The Justices, &c. vs. Yoakum.

To which ruling and decision of the Court defendants excepted.

EZZARD & COLLIER, for plaintiffs in error.

UNDERWOOD; HAMMOND & SON, for defendant.

By the Court.—Benning, J. delivering the opinion.

[1.] Was the Tax Receiver of the County of Fulton, for the year 1854, entitled to five per cent. commissions on the county tax of that county? This is the only question in the case.

The commissions to which a tax receiver is entitled, can only be such as are allowed to him by some statute.

The Tax Act of 1845 has the following section: "Sec. VII. The following rates of commissions shall be allowed on the net amount of each digest to each receiver and collector, towit:

On all digests over \$20.000 3 per cent.

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10 and under $20.000
                                             4 per cent.
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"
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                                             5 per cent.
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The Tax Act of 1847 has the following section: "Sec. III. To net the digests as provided for in the 7th section of the Act of 1845, for the Receivers, the default list to be deducted; and for the Collectors, the insolvent list, from the total amount of the digests."

The Tax Act of 1850 has the following section: "Sec. XII. The Tax Receivers and Collectors shall receive the same compensation now allowed by law, except the County of Chatham, whose Collector shall receive the same commission as now allowed to counties whose digest is less than ten

The Justices, &c. vs. Yoakum.

thousand doll's.; and to not the digest as provided for in the seventh sect. of the Act of '45, for the Receivers the default shall be deducted; and for the Collectors, the insolvent list shall be deducted from the total amount of the digest." (Cobb's Dig. 1076, 1080.)

In the Tax Act of 1851'-2 is a similar provision.

Now if the Tax Receiver is entitled to five per cent. commission on the county tax, it must be by virtue of something contained in some of these extracts from the Tax Statutes, for these extracts contain whatever there is in the law on the subject of compensation to the Tax Receiver.

The County Tax Act contains nothing on that subject. It merely provides pay for the Tax Collector—"and the Collector shall be entitled to the usual commission for collecting any such extraordinary tax to be assessed and levied as aforesaid." (Cobb, 184, 185.)

But there is nothing in any of these extracts which gives any commission to the Tax Receiver on the county tax. What the law in them contained gives him, is a named rate of commission on the net amount of his digest—a net amount to be ascertained in a particular way—and that is all it gives him.

There being, then, no Statute which gives the Tax Receiver five per cent. commission on the county tax, he is not entitled to that commission on the county tax.

If not, the judgment of the Court below, allowing the Tax Collector of Fulton that commission, was erroneous.

We think, therefore, that that judgment ought to be reversed.

No. 126.—CANN COSTLY, plaintiff in error, vs. THE STATE OF GEORGIA, defendant in error.

- [1.] The non-residence of a Juror being but a cause of challenge, proper defectum can, and consequently must be made by the prisoner, before the Juror is sworn; and it makes no difference whether such want of qualification was known or unknown at the time the Juror was sworn.
- [2.] On a motion for a new trial, in a criminal case, because of the previously expressed opinion of one of the Jurors who rendered the verdict, the Circuit Judge, quoad this question, occupies the place of a trior; and this Court will not undertake to control his judgment, as to the credibility of the proof.
- [3.] The words "trial by Jury as heretofore used in this State," mean nothing more than trial by Jury in its essential elements as contradistinguished from other modes of trial.

Murder, in Fulton Superior Court. Tried before Judge Bull, April Term, 1855.

This bill of indictment was found against the plaintiff in error, Asa Humphries, John Humphries, William Robertson and Dink Carlton, for the killing of Kent, at the October Term, 1854, of Fulton Superior Court.

At the April Term, 1855, Cann Costly, the plaintiff in error, was placed upon his trial.

DR. CHAPMAN POWELL, sworn on the part of the State, testified: "That he is a physician; attended the deceased last July; found cut on the left side, with a knife wound about one and a half inches long; the print of the heel of a shoe or boot on the left breast, and also on the right breast; a considerable bruising on the left side of the head; one on his left arm; does not know the depth of the wound; it looked like it was done with a knife; the wound was in three or four inches of the spine; the bruise on the left breast showed the shape of the heel with the nails or tacks plainly; the bruise was of a dark livid color; the breast was bruised nearly all over; the first day he saw the deceased, was on the 5th of July, and saw him every day until he died, on the

30th or 31st of that month; saw him after he was dead; is of opinion that the death was produced from the cut in the side, and the bruise he had received from the stamping; that it was his opinion, at first, that the stab might have been cured if it had not been for the other injuries; the deceased died in this county and this town, at the house of his father.

Cross-examination: Deceased complained of the wound in his side and the bruise on the head and breast, all being very painful; complained of his side after the wound healed; had very severe dysentery four or five days before he died, and fever all the time; his discharges were rather watery, mixed with bloody mucus.

Re-examined: Thinks that the dysentery was produced by inflammation from the cut and bruises; a dysentery prevailed about that time, of which a number of persons died, before and after the deceased.

DR. JOHN F. WESTMORELAND sworn, testified as follows: He attended a post mortem examination of the body of a young Kent, at his father's, last summer; on opening the chest it was found filled with a sort of sanguinous fluid, which might be called a bloody puss; the left lung was perfectly compressed; seemed to have had no air in it for some time; the pleura covering the side of the chest and covering the lung, seemed to have been inflamed; there was the appearance of a wound having been made in the left side, which had cicatrized; judging from all he could see and learn, and from apparent circumstances, is of opinion that the wound in the side was the cause of this death; the wound was made with a sharp instrument; believes that the appearances in the chest and lungs were caused by the wound in the side; thinks the chest was entered by the instrument that produced the wound; thinks there was a fusion of blood or hemorrhage into the chest, that compressed the lung; his attention was also called to a slight depression on the upper part of the left breast, having a slight discoloration; deceased had not been buried when the examination was made.

Cross-examination not taken down.

ELIJAH S. BIRD, sworn, said: "Was acquainted with Kent; saw him about the fourth of July last, on the race track, at the grocery of Asa Humphries, in this county; saw a difficulty between deceased and prisoner; first he saw of the difficulty, deceased and prisoner were quarreling; prisoner had accused Kent of rocking his house some time before that; Kent told him he did not do it and could prove himself clear of it; prisoner told him he did do it, and from that the lie was passed: prisoner then threw a rock at deceased, but did not hit him with the first rock; then a second, and hit him in the left side; they then ran together, as if going to hurt each other; prisoner had a knife open in his hand, blade turned up on the under side of his arm; did not see him when he made the lick with the knife; saw them after they were separated: Kile caught hold of deceased by the skirt of his coat and jerked him apart; deceased fell some ten feet from where they were separated; they got together again, when deceased fell from the jerking of Kile. Asa Humphries ran out to where he was; by the time Humphries got there, there were so many around witness could not see what Humphries did; about the time deceased got up, Carlton hit him on the side of the face with a chunk or piece of wood; John Humphries threw a piece and hit Carlton on the head; Costly got there by that time and Kent started to run; Wm. Roberson handed prisoner a stick and told him to hit him with it and give him hell; prisoner then threw the stick at deceased and hit him on the back of the head; while Kent was running threw at him twice; hit him about the time deceased got to the road; did not quite knock him down. Deceased staggered and fell after he got across the road; saw deceased half an hour afterwards; saw a cut in his left side, one inch or a half inch long; saw a place cut in his shirt on the left side, some two inches long; deceased was lying on the bank of the rail road some half hour afterwards; witness helped to carry him home; his shirt was bloody; did not notice the blood when deceased first fell; saw it while he was running off;

fell nearly in front of the grocery; saw the wound after deceased fell the second time; after Kent fell the second time prisoner threw the stick at him again; prisoner pursued the deceased about twenty yards; Kent, after he got up, was running down to the woods, when prisoner was pursuing him. The difficulty first commenced rather back of the grocery. about ten feet from the shed; witness and Mr. Churchill were standing close to them; Asa Humphries was talking to prisoner and told him to hit him; he was standing with his head out of the window, some 15 feet off; no person was nearer than eight or ten feet of them; prisoner's left hand was towards witness when they ran together; it was some half a minute that they were separated before they got together again; did not see deceased do any thing to prisoner after he first fell, after deceased ran and prisoner hit him: witness does not know whether he hit him with the stick in his hand or threw it at him; prisoner was right behind him.

Cross examined: Kent was on the top of prisoner when Kile pulled him off; prisoner was down.

Re-examined: This took place on the 4th July last.

WILLIAM WELMETH, sworn, said: Was present when a difficulty took place between prisoner and deceased on the 4th July last year, at the race track in this county; it was near a grocery; Asa Humphries was in the grocery that day; first he saw he heard a kind of a riot and looked out of the window and saw it was a couple of boys; Mr. Humphries put his head out of the window and hallooed, whip him Cann, whip him; saw prisoner throw at deceased with a rock or brick bat; did not hit him; witness stepped to the door, and as he got to the door he threw again and hit him on the arm; they ran together and clinched; witness saw him, Costly, hit him, deceased, on the left side, as witness then thought, with his fist; then Kile caught Kent and threw him clear away from prisoner; they were in the act of falling, Kent rather on top, when Kile threw him off; they then crowded around and witness saw Humphries run out by witness and witness stood in

the door; Kent was still rather on his all-fours when Humphries got to him; he or some one else kicked him and he fell: witness ran out and when he got to them Humphries was stamping deceased; witness caught hold of Humphries and pulled him from deceased; deceased then rose and broke to run and prisoner took after him with a stick fin his hand: threw it at him as he was running off; struck him on the back, up and down the back, the end of his stick striking the back of his head; knocked him rather on his all-fours; deceased rose running again: threw the stick at him again: does not know whether he hit him or not; some one called to prisoner to come back; and witness saw him returning some thirty or forty yards off; never saw deceased any more; supposed the rocks prisoner threw, if they were rocks, would weigh some pound or pound and a half; Kent appeared to be hurt when he was running; saw no sign of any particularhurt upon him; Kent appeared to be some 15 or 16 years old, and he thinks he would weigh about 100 pounds, and rather a feeble boy; Asa Humphries was a large, stout man,. and would have weighed about 200 pounds.

Cross-examination: Did not see deceased push prisoner back before he was in the act of falling; saw Humphries stamp deceased as many as three times on the breast, with great violence.

The State then introduced WILLIAM KIMBROUGH, who, being duly sworn, said: He was present at the grocery at the race ground, on the 4th of July last; saw the fracus between prisoner and deceased on that day in this, Fulton County; did not hear the first of the difficulty; heard a few words of quarrelling between them; prisoner accused Kent of rocking a house; deceased denied tocking the house, and said, he could prove himself clear, and that he was at home on that night; Costley had a knife drawn in his hand at the time; rushed on Kent, who rather begged off; prisoner kept rushing on him; about that time Humphries poked his head out of the window and said, Cann, damn him whip him; about that time prisoner threw a rock at deceased and missed

him; picked up another and threw it, and witness thinks, struck him on the shoulder; he struck him with the rock as they both made at each other; as they came together, witness saw prisoner with the knife in his hand, and he stuck the knife in the left side of deceased as they came together: Kent then caught prisoner by his hair as he cut him, and threw him on his all-fours and jumped on him; Kile then stepped up and threw Kent off some eight or ten feet; by the time he fell Asa Humphries commenced stamping him: there was a crowd around and witness caught Humphries and threw him off; Kent then rose to his feet and was making away, when William Roberson gave prisoner a stick and told him to beat him with it; prisoner struck at deceased, and witness thinks, missed him; Kent then started to run and prisoner after him, and threw the stick and struck him rather between the shoulders and knocked him down to his all-fours: deceased rose and run again, prisoner after him, and threw the stick again and struck him on the back of the head and knocked him on his all-fours again; deceased rose and still run; prisoner followed a little piece and threw the stick again, and as witness thinks, missed him; Humphries then hallooed and said, come back Cann, you have beat the damn rascal enough; deceased then got to a little skirt of woods and witness lost sight of him, until he got to a little open field; witness then. went and found where deceased had fell and fainted, and helped to carry him to the house; deceased was called Sidney Kent.

Cross-examination: Prisoner had the knife in his hand before he threw rock, and when he threw, changed the knife from his right hand to his left hand.

The State then introduced JoSIAH KENT, who being duly sworn, said: Deceased was a son of witness; his name was JoSiah James Sidney; called Sidney; he died the last day of July of the last year; Dr. Powell attended on him; he was the same person on whom they had the post mortem examination.

The cross-examination was not taken down, prisoner's Counsel not desiring it.

Here the State closed and Counsel for the prisoner introduced as a witness Dr. NOEL DALVIGNEY, who being duly sworn, testified as follows: Says that he is a physician and a surgeon; has been practising about 35 years; made the post mortem examination of deceased; was called to see deceased on the sixth of July; found him with a superficial wound on the left side, rather in the back, that he would call a cut: patient was laboring under great difficulty of breathing, principally on the left lung; several bruises were all over the chest along side of the spine, and also on the head; the largest member of the bruises had the full shape of the heel of a boot; the marks of the pegs were very distinct; examined the cut and found it a superficial one, which witness did not think penetrated the cavity. On the first of August, was called to perform a post morten examination by Dr. Westmoreland; found the chest very much disturbed, principally on the left side. The puncture of a knife between the ribs into the cavity gave discharge to an enormous quantity of matter of a pinkish color; on opening the chest found the left lung entirely collapsed; the matter withdrawn out of the chest was about three pints; the membranes of that lung were ushered together, it was so much destroyed; the cavity of chest was carefully examined and several spots were found imprinted, which were marks of inflammation during life; the largest about the size of a half dollar, and corresponding to the cut, the marks exactly corresponding to the external bruises; examined the condition of the abdomen, and found its contents in a very good condition; the condition of the chest, which would have produced the inflammation of the lung, in the opinion of witness, produced the death; the cut, also, must have contributed to the inflammation very much. Witness does not think that the cut would have produced the death, and that the cut did not penetrate into cavity of the chest, and saw nothing which could induce him to believe so; would not consider the wound, by itself, capable of producing

death, if well attended; it could not be classed among mortal wounds; the cut with the knife could not have produced the collapse of the lungs in two days; would consider the blow on the chest as much more likely to have produced this collapsed condition of the lung; the stamping of a stout man on the chest two or three times, might be sufficient to have produced the condition of lung; gave his testimony before the Magistrate was summoned on the part of the State.

Cross-examined: The immediate cause of the death was inflammation of the lung; there was a great deal of inflammation opposite the cut and the bruise, which contributed, together, to produce the death.

After argument on both sides had been concluded, the Court charged the Jury as follows—charging, among other things: that the first question to be determined was, whether a homicide had been committed; and if there had, the next inquiry was by whose act or agency it had been perpetrated; whether the prisoner there on trial, by any act of his, produced, or contributed to produce, the death of Kent; that if he did, the next and most important inquiry was, to determine under which of the several grades of homicide this was to be classed. The Court, in this connection, read from the *Penal Code* and expounded to the Jury the several grades of homicide, and charged them that it was their province to determine, from the evidence, whether it was murder, voluntary or involuntary manslaughter or justifiable homicide.

After which charge of the Court, the Jury retired and brought in the following verdict:

We, the Jury, find the prisoner, Cann Costly, gailty.

THOS. BELL, Foreman.

After the rendition of which verdict and during said term of said Superior Court, before adjournment thereof, the said Cann Costly then and there, by his Counsel, moved for a new trial upon the following grounds:

1st. The verdict of the Jury was without sufficient evidence to support it.

2d. The verdict is decidedly and strongly against the weight of evidence in the cause.

3d. The verdict was contrary to the charge of Court.

4th. The charge of the Court was contrary to law, in that the Court said to the Jury that the main question for them to consider was, whether any act of Costly contributed in any way to the death of said Kent.

5th. That John McCarter, one of the Jurors who tried the cause, was an incompetent Juror, residing at the time of the trial in the County of Cobb, which was unknown to the prisoner or his Counsel, until after his conviction.

6th. That Joshua Butler, one of the Jurors who tried the cause, was an incompetent Juror, he having, on several occasions before he was impannelled to try said cause, expressed an opinion unfavorable to the prisoner, to-wit: at one time said that Costly ought to be hung for murdering the poor boy Kent; and at another time said that Costly ought to be hung for murdering Kent; and that if he could get on the Jury he would hang him without regard to the evidence—the fact last above stated not being within the knowledge of prisoner until after his conviction.

The following affidavits were filed with the motion for a new trial:

CHARLES CANN COSTLEY, the defendant in the above mentioned case, personally being before the Court on his corporal oath, swears that since he has been convicted of the above stated case, he has been informed that one of the Jurors, John Butler, who sat upon his trial in the above stated case, was an incompetent Juror on the grounds following:

1st. That said Juror, Butler, before he was impannelled or solicited as a Juror, stated openly to one Thomas Carlton, that Cann Costly ought to be hung immediately, without Judge or Jury, and that if he could get on the Jury to try

him, (Cann Costly,) he would hang the said Costly in spite of all the evidence that could be brought in for the said Costly, for that he, the said Costly, was naturally of a mean disposition.

2d. This deponent has understood, since the verdict of guilty in said cause, that before said Butler was put on said Jury who tried him, he said to Mrs. Eliza W. King, wife of General George W. King, in speaking of the parties charged in the above stated case, jointly with others named as defendants in said indictment, in connection with this defendant, (Cann Costly,) that every one of them ought to be hung for murdering the poor Kent boy.

3d. This deponent has understood, since his said conviction as above mentioned for murder, and he has been informed, that one of the Jury, to-wit: John McCarter, at the time he was impannelled as one of the Jurors who found the verdict of guilty against this defendant, was a resident citizen of the County of Cobb in this State, and not a citizen residing in the County of Fulton, authorized to sit on a Jury; and this defendant further swears, that none of these reports came to the knowledge of this deponent until after the verdict was given which found him guilty as aforesaid, and that he believes the information above mentioned is true.

cann ⋈ costly.

Sworn to in open Court, 19th April, 1855. B. F. Bomar, C. K.

The other Counsel for the prisoner having stated in their places that they knew nothing of the disqualification of the said John McCarter before said conviction, Amos W. Hammond, one of prisoner's Attorneys, made the following statement in writing: "Amos W. Hammond being called on by the Sol. General Bleckley, states that before the Juror, McCarter, was impannelled, he had heard that said McCarter had property in the County of Cobb in said State, and that

he wished one of the rail road agents would give him, the said McCarter, a free ticket for him and his wife to go home to Marietta; and said Hammond insisted on the said agent to give said ticket. That this is substantially all he remembers to have heard about the residence of said McCarter before he was impannelled; and that at the time this did not occur to him, nor afterwards, until the same was communicated to him in writing by Hiram R. Delay.

Signed,

A. W. HAMMOND.

Counsel for prisoner also read with this the affidavits of Thomas Carlton, Hiram R. Delay and Mrs. King, upon the objections of the incompetency of said McCarter and said Butler, as follows:

GEORGIA, FULTON COUNTY:

Thomas Carlton personally came and appeared before me, attesting Notary Public, acting in and for said county, and after being sworn, deposeth and saith, that about two months back John Butler, one of the Petit Jurors who sat upon the case of The State against Cann Costly and others, indicted for the murder of James Kent of Fulton County, at the April Term of said Court, in which a verdict of guilty was found by the Jury against said Cann Costly, told this deponent, in speaking of the homicide of said James Kent, that Cann Costly ought to be hung immediately without Judge or Jury. and that if he could get on the Jury to try him, he would hang the said Costly in spite of all the evidence that could be brought in for him, for that Cann Costly was naturally of a mean disposition; and that this communication was never made to any one by this deponent, until after the verdict of guilty was found and delivered in Court by the Jury. this deponent further swears, that another person was present when the conversation was had between this deponent and said Juror, Butler. THOMAS CARLTON.

Sworn to and subscribed this 16th April, 1855, before me, Amos W. Hammond, Notary Public.

GEORGIA, FULTON COUNTY:

Mrs. Eliza G. King, wife of Gen. George W. King, personally came before me, the attesting Notary Public, acting in and for said county, and after being duly sworn, deposeth and saith, that in conversation with Joshua Butler, one of the Jurors who tried Cann Costly for the charge of murder (with others) upon the body of James S. Kent, that the said Butler, before the trial of said cause, said to this deponent, in speaking of the death of said Kent, in connection with the two Humphries, Cann Costley, Roberson and Carlton, that every one of them ought to be hung for murdering this poor Kent boy; and she further swears, that she never communicated this fact to the said Cann Costly or any of the family, (not intending to testify in the cause unless compelled by law,) but to his mother, since the said Cann Costly was found guilty by the Jury and she says that she does not know the said Cann Costly personally; and until Mrs. Costly called on this deponent, since the finding of the said Cann Costly guilty, this deponent was not personally acquainted with Mrs. Costly. ELIZA G. KING.

Sworn to and subscribed before me the 18th April, 1855. Amos W. Hammond, Notary Public.

GEORGIA, FULTON COUNTY:

Hiram R. Delay personally came and appeared before me, the attesting Magistrate, acting in and for said county, and after being duly sworn, says, that John McCarter, one of the Petit Jurors who sat on the trial of Cann Costly, who was found guilty of murder at the April Term of the Superior Court of said county, was not, at the time of sitting on said Jury, nor had been for any time during the last twelve months next before this time, a resident citizen of the County of Fulton; and the said Delay further swears, that said McCarter had been working with the deponent as a journey workman or jobber, during a greater part of last year, from August until he went to Marietta, which place he claimed as his home; at which place his family permanently resided, and where he paid his taxes for several years past; and this

deponent further swears, that during the time the said McCarter was working for this deponent, that said McCarter was in the habit of going to Marietta, where his family resided, once in every two or three weeks, until the last time just before christmas, when, on account of the difficulty of collecting money, he had not been home in two or three months, when his hand became hurt; and from that time the said McCarter has not resided in Atlanta, but still resides in Marietta.

H. R. DELAY.

Sworn and subscribed before me, T. G. Thomas, J. P.

Upon hearing of which affidavits, the Court granted said rule nisi of the Solicitor General, and gave him until next term of said Court to show cause why said new trial should not be granted. At which term of the Court the Solicitor General exhibited for cause the following affidavits:

GEORGIA, FULTON COUNTY:

Before me, Samel B. Hoyt, a Justice of the Peace in a foresaid county, personally came Joshua Butler, who being sworn, deposeth and saith, that he has heard read an affidavit purporting to have been made by Eliza G. King before A. W. Hammond, Notary Public, and one purporting to have been made by Thomas Carlton before said Hammond, touching expressions which this deponent is alleged to have made. in relation to the case of The State vs. Cann Costly, lately tried in the Superior Court of said county. This deponent states, on oath, that he never did make use of any such expressions or any thing like them; he never has conversed. with Mrs. King or in her presence, about the case or the killing of Kent, or about any of the parties charged therewith; in fact, he has never spoken more than half dozen words with her in his life, and does not believe he would know her if he were to meet her in the road. With Thomas Carlton this deponent never has had a word of conversation, that he recollects, touching said homicide or any of the parties indicted: for the same; and he knows that he never told him or any

other person that Cann Costly ought to be hung, or that if he (deponent) could get on the Jury he would hang him. Deponent further states, that up to the time he was sworn as a Juror to try said Cann Costly, he never had formed or expressed, either from rumor or otherwise, any opinion as to his guilt or innocence; he did not see the crime committed, and had heard very little about the matter from report or rumor. From the little he had heard, he was disposed to look on the case favorably for Costly, and was somewhat surprised to find, on the trial, that the evidence was so strong against him. Deponent had no bias or prejudice resting on his mind against said Costly, and was influenced, solely and entirely, in agreeing to the verdict in said case, by the evidence and the charge of the Court. He is confident that throughout the trial, he could and would have allowed, and did allow, full weight to any evidence going to show the innocence of the prisoner. JOSHUA BUTLER.

Sworn to and subscribed before me this 19th April, 1855. S. B. Hoyr, J. P.

GEORGIA, FULTON COUNTY:

Harrison Bryant being sworn before me, says that he was one of the Jurors who tried Cann Costly at the present term of the Court, for murder, and that there was no other verdict proposed than the one found, and that he heard no one propose to find the defendant guilty of a less offence than murder; and further states, that his fellow-Juror (Butler, whose given name he does not know,) behaved himself in a prudent manner, and did not appear to have any prejudice in the case.

HARRISON BRYANT.

Sworn to before me this the 20th April, 1855.

L. C. SIMPSON, N. P.

The Court over-ruled the motion, and refused to grant the defendant a new trial, and Counsel for defendant excepted.

Underwood; Hammond & Son, for plaintiff in error.

BLECKLEY, Sol. Gen. for defendant.

Costly vs. The State.

By the Court.—LUMPKIN, J. delivering the opinion.

[1.] If the Juror, John McCarter, was not qualified, it was but cause of challenge proper defectum; and could have been made by the prisoner, and must have been made before the Juror was sworn. And it is well settled, both by the authorities of the Courts of Great Britain and of this State, that it is too late, after a Jury has been sworn, to challenge any of its members proper defectum; or to move to set aside the verdict on that account. (2 Com. Digest, 322, title Challenge Peremptory, letter C; 1 Chitty Crim. Law, 440, 441, 541; 4 Dallas, 353; 2 Bay. 150; 7 Cranch. 290; 3 Bacon, 750; Coke Litt. b. 155; Dudley (Ga.) 85; 2 Ala. R. 275; 2 Man. & Ry. 309; 8 Barn. & Cr. 252.)

Some of the cases cited show that the Jurors taken were wholly disqualified to serve, if objected to-some aliens, some infants, &c. who are no where allowed to serve on Juries, if And these cases and others clearly establish the rule, that if such disqualified Jurors are taken and not objected to, or challenged before being sworn, they cannot be set aside except for matter subsequent to such swearing; and their verdicts, both in criminal and civil cases, are as binding and valid as if they had possessed the proper, full, and in all respects, requisite qualifications. And it makes no difference whether such want of qualification was known or unknown at the time the Juror was sworn. In either case, the verdict must stand and the judgment follow it. (2 Porter R. 100; 3 Stewart, 454; 1 Yerger, 219; 8 Ib. 508; 1 Institutes, 108; 3 Vin. Abr. 11, 764; 2 Hawk. Pl. Cr. 43; Yelverton's Rep. 24.)

But it is needless to discuss this question. Since the decision in the case of John Epps, at Gainesville, Oct. 1855, and the construction there put upon the 38th section of the Judiciary Act of 1799, (Cobb 546) it is too late now to consider this a debateable point.

[2.] As to the Juror, Butler, we are unwilling to control

Costly vs. The State.

the opinion of the Circuit Judge as to his competency, resting as it does, wholly upon the credibility of the Juror and his assailants. If he is to be believed, he was an impartial Juror—if Carlton and Mrs. King, he was not indifferent. We would not undertake to disturb the finding of triors—why should we that of the Court, sitting quoad this point in the place of triors? It is with great and increasing reluctance that we will sustain any objection to a Juror, after verdict, when no attempt was made to test his disinterestedness before being sworn. The ancient rule, as laid down by Coke, Hale and Hawkins, was against this practice; and the sooner we return to the doctrine as maintained by them, the better.

[3.] The provision in the Constitution of 1798, that "trial by Jury, as heretofore used in this State, shall remain inviolate", has been invoked in aid of both of the foregoing grounds. We apprehend that nothing more is meant than what is found in the Constitution of 1777 and reiterated in the Constitution of 1789, that "trial by Jury," (as contradistinguished from any other mode) "shall remain inviolate forever." (Watkins' Dig. 16, 29.) And if any importance be attached to the words "as heretofore used in this State" in the Constitution of 1798, we answer, that before the adoption of the Constitution of 1798, it was expressly enacted that "no exception against any Juror on account of his qualification, shall be allowed after he is sworn." (Watk. Dig. 627.)

There is no conflict, therefore, between the Constitution of 1798 and the 38th section of the Judiciary Act of 1799, inasmuch as the mode of impannelling a Jury designated and required by this Act was, that which was in use in the State at the adoption of the Constitution of 1798.

And we embrace this occasion to repeat, emphatically, the position taken by this Court in 5 Ga. Rep. 194 et passim, and again and again occupied before and since, namely: that this provision in our Constitution was intended merely to secure the individual from the arbitrary exercise of power, unrestrained by the great fundamental and established principles of private rights and distributive justice. But that the forms

Holmes vs. Dobbins et al. ex'rs.

of administering justice and the duties and powers of Courts, as incident to the exercise of a branch of sovereign power must ever be subject to Legislative will. Is not the method of drawing, summoning and impanneling both Grand and Petit Juries entitled different in this State from what it is in England? And yet, what defendant has ever challenged the array on that account? Could it be made to appear that a Statute of the State produced a total prostration of the trial by Jury or involved the accused in difficulties which rendered that constitutional right unavailing for his protection, we might, under such circumstances, consider ourselves called upon to interfere. No such Act has been passed. It would be disrespectful to anticipate such an improbability.

As to the other formal exceptions we do not deem them deserving of a serious notice. That a most brutal murder was perpetrated, no one who reads the evidence can doubt. And the most that can be said in favor of the defendant is, that his agency in the tragedy was not quite, perhaps, so diabolical as that of one other of the accomplices. It was quite sufficient, however, as to justify fully the verdict of guilt, which was rendered against him. A Jury returning any other, upon the testimony, would not assuredly have escaped being attainted, did that ancient Common Law practice still prevail in Georgia.

No. 127.—VIVIAN HOLMES, plaintiff in error, vs. MILES G. DOBBINS et al. executors, defendants.

^[1.] Newly discovered evidence may be the ground of a continuance, even after the trial has commenced.

^[2.] If the party who takes out a commission to examine a witness on interrogatories, is in the room in which the commission is executed, at the time when it is executing, the commission is not well executed.

Holmes vs. Dobbins et al. ex'rs.

Assumpsit, in Troup Superior Court. Tried before Judge Bull, November Term, 1856.

This was an action on a promissory note. Before the cause was submitted to the Jury, the plaintiffs objected to the interrogatories of one Weldon, taken by defendant, and which had been in office twenty-four hours, for certain causes apparent on the face of the interrogatories; which objection was over-ruled by the Court. Plaintiffs also objected to said interrogatories, because they were taken in the presence of defendant; in proof of which, they called on defendant as a witness. This was objected to by defendant, because he had not been subpænaed beforehand, in terms of the law; and also, because interrogatories, unexceptionable on their face, could not be attacked by parol testimony; which objections the Court over-ruled, and ordered defendant to answer.

Defendant stated, that during the execution of the interrogatories, he was in and out of the room occasionally; thatthe room was about eighteen by twenty feet; that he sat at one end and talked to another gentleman, while commissioners and witness were at a table at the other end; that he made no remark to them, and did not know what the witness swore.

The Court ruled out the interrogatories. Counsel for plaintiff then asked Counsel for defendant if they were surprised. They replied, "not as yet," and proceeded to make an exception to the declaration, inasmuch as the note sued on was not correctly described therein. The Court held the objection premature. The cause was then submitted to the Jury, and the note offered. Being objected to, it was allowed to be read. The exception was, that beneath the note, on the same paper, was written the following: "It is understood, that as fast as the steam-mill earns money, it is to be applied to the payment of the above note of four hundred and twenty dollars," signed by the defendant.

Holmes vs. Dobbins et al. ex'rs.

This note or memorandum was not noticed in the declaration.

Counsel then moved for defendant to continue, on the ground of surprise in the matter of the rejected interrogatories, which the Court refused.

He then moved to continue, on the ground of testimony discovered since the commencement of the trial, and offered an affidavit of Eugenius Holmes, who swore that a certain witness said he heard John G. Hill, plaintiff's testator (to whom the note was given) say, that he was hauling lumber from defendant's mill to pay said note, and the witness had seen said Hill hauling said lumber; which testimony defendant offered to make affidavit, was just discovered.

The Court refused the continuance, and the Jury found for plaintiffs the amount of the note; and defendant excepts to the said several rulings of the Court.

- E. Y. HILL, for plaintiff in error.
- B. H. HILL, for defendants.

By the Court.—Benning, J. delivering the opinion.

In this case there was a plea of payment; and the newly discovered evidence would have been pertinent to that plea.

- [1.] What particular reason the Court below had for refusing the motion for a continuance, made on the ground of the newly discovered evidence, is not disclosed by the bill of exceptions. And as no reason appears to us for refusing the motion, we can only say that we think it ought not to have been refused. We therefore grant a new trial in the case.
- [2.] The Court, we think, was right in rejecting the interrogatories. The defendant was too near to the commissioners and the witness, at the time when they were executing the commission. Tillinghast, Starke & Co. vs. Walton, (5 Ga. R. 855.)

ABANDONMENT.

See Limitation of Actions, 4.

ACTION.

1. A person aids a debtor to remove himself and his property out of the State: Held, that no action lies against him at the suit of the creditor. Matthews vs. Pass.	141
2. B being a mortgage debtor of A, agrees with C, upon sufficient consideration, to discharge the liability. C not complying, the mortgage is foreclosed. No right of action accrues to C to recover of B the amount C paid on the debt. Goodson vs. Cooley	599
ADEMPTION.	
See Devise and Legacy, 6, 7.	
ADMINISTRATORS, EXECUTORS, &c.	
1. If an executor commits a devastavit, a purchaser knowing of the breach of trust, can be made liable by those interested. Rogers vs. Fort et al	94
Hargroves et al. vs. Batty	130
2. One executor is not liable for assets which come to the hands of his co-executor, nor ordinarily responsible for his laches. Kerr vs. Waters et al	136

righ of si nary	ter an acquiescence for more than 25 years, the ats of a purchaser will not be disturbed on account light irregularities in the proceedings of the Ordiy, as to publication of orders, &c. Peterman vs. atkins	158
4. De	finition of "Public Places of the county." Ibid.	
tor tate	to make titles, in accordance with a bond of intes- e, a new order is not necessary to authorize the ad- nistrator de bonis non to make the deed. Ibid.	
repr a po exe	ne executor of the only surviving executor, is the resentative of the original estate, notwithstanding ortion of the will could not, by any possibility, be ceuted until the death of original executor. Burch Burch	174
and ted fuse the	here the testator directs a sale of his whole estate, if the provisions of the will show that he contemplate a sale by the executor, the Ordinary should not rete to grant letters testamentary, because a portion of elegatees suggest, by caveat, that they desire to take testate in kind. Ibid.	
8. W	here citation issues for one, letters may be granted another. DeLorme vs. Pease	220
of a	oney or goods of another person coming into hands administrator with those of deceased, are not ass. Cooper vs. White	554
	Devise and Legacy, 2, 8. Equity, 6, 7, 8. Parts, fc. 1.	

ALIMONY.

See Husband and Wife.

INDEX.	635
THINING.	000

AMENDMENT.

1. Where the liberty of appeal is left out of a confession of judgment by mistake, it is amendable. Gaines vs. Wedgeworth	31
2. Where material words are omitted by mistake, in an affidavit to appeal, in forma pauperis, it is amendable. Tompkins vs. Venable	33
3. Is not allowable where it makes an entire new cause of action. Williams vs. Hollis	3 13
4. A clerical mistake in sci. fa. amendable. Johnson, Gov. vs. Goddard	59 7
See Judgment, 4.	
APPEAL.	
1. If the surety on the appeal becomes insolvent pending the appeal, the appellant may save it by affidavit, that owing to his poverty he was unable to give any better security. Sample vs. Cary & Stanford	573
2. An appeal may be entered by a lunatic in a period of sanity. Formby vs. Wood	58 1
See Amendment, 2. Judgment, 6.	
ATTACHMENT.	
1. The affidavit was, "that C J & W, partners, using the name of C J & Co. were indebted, &c. and that the said C J & Co. reside out of this State": Held, that it is sufficiently certain. Chambers, Jeffers & Co. vs. Sloan, Hawkins & Co.	84

2. The defendant must first ascertain his damages against the plaintiff, before he can sue on the bond. Aledge vs. Lee.	411
3. The defendant replevies on the day of attachment, and the Sheriff fails to advertise: Held, does not vitiate the pending suit. Reynolds vs. Jordan	436
4. A claim may be put in after judgment. Rogers vs. Bates.	545
ATTORNEY,	
1. Though he may have a general lien upon an execution in his hands for fees due him by the plaintiff, that lien does not extend to the judgment. However of Mitchell vs. The M. Br. R. R. & S. Co	85
2. Is liable to ca. sa. in Georgia. Elam vs. Lewis	608
BANKS AND BANKING.	
1. Charters are contracts, and to be interpreted as such. Thornton vs. Adkins	325
2. Each stockholder is a party thereto. Ibid.	
3. Each stockholder in P. & M. B'k of Columbus, is liable for the ultimate redemption of such part of the circulation, as his stock bears to the capital stock. <i>Ibid.</i>	
4. The creditor may proceed at Law or in Equity. Ibid.	
5. If he proceeds at Law, his petition must aver all the facts necessary to show the amount of liability; and hence, must aver the amount of outstanding circulation. 1 bid.	

INDEX.	637
See, also, Robinson vs. Lane	337
6. A stockholder who participated in the illegal organization, cannot recover of other stockholders on bills. Robinson vs. Lane	337
7. Where shares are transferred to B, without his knowledge, he can be made liable only on the ground of acquiescence or fraud. Ibid.	
8. The stockholders are not relieved by the fact, that assets sufficient to pay the debts, were turned over to an assignce. I bid.	
9. Conceding that debts due to and from a corporation are extinguished on dissolution, the Legislature may intervene and prevent such a result. I bid.	
See Evidence.	
BERRIEN, HON. J. M.	
Proceedings on death of	197
BILL OF EXCEPTIONS.	
See Practice, 7.	
BILL OF EXCHANGE.	
See Lien, 1.	
CA. SA.	
See Attorney, 2. Sheriff, 2.	

CHARGE OF THE COURT,

1. If not warranted by the case, should not be given. The Central R. R. &c. vs. Hines, P. & Co	203
2. There is no error in reading over slowly a written request, and saying I give you that in charge. Feagan vs. Cureton	404
3. It is proper for the Court to refuse to express an opinion as to which is true of several possible inferences of fact. Hillburn vs. O'Barr	591
CLAIMS AND CLAIM LAWS.	
1. After a levy and claim, the fi. fa. cannot be with- drawn without an order of Court. Branch vs. Riley.	161
2. The dismissal of a claim by the Court for not making parties, is not, under the Statute, a withdrawal of the claim. Lynch vs. Bond	314
See Attachment, 4.	
COLUMBUS—CITY OF.	
1. Construction of Acts of 1845 and 1853, as to power of Council over the funds of corporation, and their liability for the exercise of their discretion. Semmes vs. The Mayor, &c	471
COMMON CARRIERS.	
1. If the owner of a boat directs cotton to be left at a particular landing, agreeing to receive it there, a deposit of the cotton at that place constitutes a good delivery. Fleming vs. Hammond	145
See Rail Roads.	

CONSTITUTIONAL LAW.

1. Where a Statute purports to be amendatory of several preceding it, alterations of the former by excisions, additions or substitutions, create no discrepancy between the title and the Act. Robinson vs. Lane	338
2. The Legislature cannot divest a citizen of his property, without providing just compensation. Powers vs. Armstrong	427
3. Until paid, he is still the owner, and does not hold a mere lien. Ibid.	
See Jury, 5, 11.	-
CONTINUANCE.	
1. The fact that a cause has been pending for four years, is no reason why a continuance on a legal showing, should not be granted, it not appearing that the delay was caused by the party moving the continuance. Hooper & Mitchell vs. The M. Br. R. R. & S. Co	85
2. For Providential cause, should not be charged to either party. Printup vs. Mitchell	587
3. Newly discovered evidence may be a ground for continuance, even after trial commenced. Holmcs vs. Dobbins	629
CONTRACT.	
1. When the contract is for the repair of sundry independent pieces of machinery, and some are finished and accepted, the failure to repair the others, is no ground for refusing to pay for that accepted. The Coweta F. M. Co. vs. Rogers	416

2. There must be a consideration to sustain every contract. Burns vs. Hill et al	22
3. Mere inadequacy of price, unless so great as of itself to be evidence of fraud, is not a sufficient ground for impeaching the contract. Semmes vs. The Mayor, &c	
4. Where B takes A's note for C's indebtedness to him, and C gives a mortgage to secure B, C is the surity of A, and indulgence given without his consent, discharges him. White vs. Ault	5 51
5. An agreement, in writing, that if A will become surety for B, and pay half the purchase money, he should have half the land, is good; and the fact that A, when he pays his half, has it indorsed as paid by him as surety, does not affect his rights. Whitaker vs. Tompkins.	5 75
6. A being debtor of B stipulates with C to discharge the debt. B being no party to the contract, A does not become a mere surety to C. Goodson vs. Cooley.	59 9
See Damages. Equity, 9, 10. Land Laws, 1. Vendor and Purchaser.	
CORPORATION.	
1. A body corporate is not responsible for an erroneous exercise of discretion, although the consequences may be injurious. Semmes vs. The Mayor, fc	471
COSTS.	
1. The defendant is chargeable with full costs, if the suit sounds in damages, although the verdict be under thirty dollars. Morgan vs. Keith	

COUNTY TAX.

See Tax and Tax Receivers, 1.

CRIMINAL LAW.

8. If the vendee of land be evicted, he can recover only the value of land at the time of purchase, with interest, for so long a time as he pays mesne profits, and the costs of the ejectment that may be brought against him. Fernander vs. Dunn	497 -
See Macon, 3.	
DEBTOR AND CREDITOR.	
1. A fraudulent transfer, though good against the debtor, is not against a creditor, though the condemnation of the property may work to the benefit of the debtor: Aliter, if there is collusion between debtor and creditor. Feagan vs. Cureton	
DECEIT.	
1. A statement, that "another is a fine man; owns 9 or 10 negroes, and able to do well," will not, alone, make the speaker liable for credit given to C. Savage vs. Jackson	305 -
2. It must appear that the recommendation was made to the party giving credit, or his agent, for the purpose of obtaining the credit. Harrison & Seward vs. Savage	310 ,
DEED.	
1. A deed witnessed by a J. P. and another, is properly admitted to record, though there is, in the attestation clause, nothing said about delivery. Watts et al. vs. Smith	. 8
2. A deed purporting to be made by two partners, is signed by one only; it conveys the undivided interest of that one, in the land. Jackson vs. Stanford	15.

~ 1	0
104	

3. The affidavit of subscribing witnesses was, "that he saw the subscribing witness subscribe his name to the within bill of sale, and acknowledged for the within	
purposes": Held, sufficient to admit to probate. Buntyne, admr. vs. Stone	78
4. Where a deed is made under a power of Att'y, a misrecital of the latter, in the former, does not vitiate. Jones and another vs. Tarver	279
See Ejectment, 4. Limitation of Actions, 3.	
DEVISE AND LEGACY.	
1. A testator bequeathed to his married daughter, in trust, for her sole and separate use, certain negroes, naming them, and if she died without child or children born of her body and living at her death, the property to revert to his estate and be equally divided among certain grand-children: Held, 1st. That the will created an executory devise in favor of the grand-children. 2d. That the devisees might elect to follow property bought with the proceeds of that originally bequeathed, or assert and enforce their lien upon the same in a Court of Equity. 3d. That notice of this claim would affect a purchaser. 4th. That this incumbrance was a good defence, either at Law or in Equity, against the payment of the purchase money. Phinizy vs. Few	66
2. A bequest of rail road stock "for the purpose of educating my children now under age, and direct that they be boarded and educated out of the same, until they receive a thorough classical education, if they have sufficient capacity for the same," is not a bequest of the dividends on the stock to the children, and their guardians cannot require the executors to give them a power to draw the same. Parks and another	
vs. Hardy et al	127

- 3. A bequest was made to the wife of a choice of the negro women. By the conduct of the executors, she was prevented from making a choice: *Held*, that on making choice, she is entitled to the hire and issue, since the time she demanded her property. *I bid*.
- 4. A testator devised his whole estate to his executors, (for whom he made provision for their perpetual succession,) and then provided for the disposition of the income annually: Held, 1st. That such of the provisions of the will as are valid can be executed, and the others are illegal, because they require a perpetuity to execute them. 2d. That the trust term will continue in the executors so long as is necessary to carry out the legitimate purposes of the will and no longer. 3d. That the income of the general estate being devised to certain persons with certain deductions, to be made on certain contingencies, and there being no disposition over of the corpus that these devisees took an absolute estate, the possession being postponed till the valid purposes of the trust were executed. Smith vs. Dunwoody et al.....

- 7. The presumed ademption may be rebutted by parol evidence. *Ibid*.

Sce Slaves, fc. 1,. 3.

DISCOVERY AT LAW.

See Interrogatories.

EASEMENT.

1. A gift of the right of way, is not a gift of the earth and other materials which may exist within the boundary lines of the way. Smith vs. The Mayor, fc. Rome	89
EJECTMENT.	
1. Where both parties claim from a common grantor, it is unnecessary to go back of his title. Miller vs. Surls.	331
Sec, also, Rogers vs. Bates	545
 A vendor who has given bond for titles, cannot sue to recover back the land on his own account, after he has transferred the notes, without recourse on him. Tompkins vs. Williams. Query. Whether his name cannot be used by the transferree of the notes to enforce payment. Ibid. 	
4. Plaintiff can recover, not only mesne profits for use an occupation of land, but also for all trespasses committed. Hence, it is a bar to any future action of trespass. Cunningham vs. Morris.	58 3
4. Grantee of a deed void under 32 Henry VIII. may maintain ejectment in name of granter. Thompson vs. Richards	59 4
See Limitation of Actions.	

EQUITY.

	1. A bill will not be maintained in Equity to obtain a discovery, when such discovery would be useless. Burns vs. Hill et al
	2. An equitable set-off, though small, will sustain a bill, though there be a remedy at Common Law, if in prosecuting that remedy, numerous suits would be necessary. <i>Ibid</i> .
:	3. A Court of Equity will not arrogate to itself jurisdiction, where the remedy at Law is complete. The Trustees, &c. vs. Robbins
•	4. A, to defraud his creditors, transfers his property to B and dies. His administrator files a bill against B, to get possession of the property and pay the creditors: Held, that there is no equity in the bill. Crosby vs. DeGraffenreid
	5. A bill in Equity ought, in general, to be brought only in some county in which a defendant resides. Anderderson vs. Sego
	6. To entitle a party to a bill of interpleader, he must claim no interest in the fund or property claimed by the contestants. Adams vs. Dixon
	7. An executor has such an interest: moreover, a judgment on the legal title in a Court of Law will protect him. <i>Ibid</i> .
	8. Nor will Equity sustain such a bill for marshalling the assets. The duty of the executor is clear. Ibid.
	9. Where there is an unreasonable inadequacy of price, the Court will refuse a specific performance. Wilcoxson vs. Eason

10. Where a rescission of the contract is decreed, the better practice to require the purchase money refunded. *I bid*.

See Injunctions.

• EQUITY PLEADING AND PRACTICE.	
1. A party interested in an estate, but who has released his interest "in order to become a witness for the administrator," is not a proper party to a bill against the administrator. Buntyne vs. Stone	
2. The rule as to overcoming an answer by two witnesses, &c. does not apply to an answer upon information and belief. Rogers vs. French	31 6
3. Leaving a copy of a bill at defendant's house is a sufficient service—and even of an injunction. However, the defendant may relieve himself from a contempt, by showing he did not know of the service. Morris vs. Bradford	527
ERROR.	
1. The burden of showing error is upon the party alleging it. The Mayor, &c. vs. Duke	98:
ESTOPPEL.	
1. A judgment is not, unless the matter necessarily had to be determined before the Court could give judgment. Hunter vs. Davis	

EVIDENCE.

1. Where parol declarations of the father, in possession,

are relied on to prove a gift to the son, other and inconsistent declarations made at other times, may be relied on by the other party. Hansell vs. Bryan	167
2. Delivery may be proved by acknowledgments. Ibid.	
8. It is error to refuse to defendant the privilege of cross-examining a witness on a material point; nor is the error cured by the defendant subsequently reintroducing the witness. White vs. Dinkins	
4. When defendant in an action of trover relies upon outstanding title in a third person, the disclaimer of title by such person is admissible in evidence. <i>Ibid</i> .	
5. Contemporaneous declarations are admissible as part of the res gestæ. Robinson vs. Lane	337
See, also, Feagan vs. Cureton	404
6. When the amount of outstanding circulation is a material question, any evidence should be received which aids in fixing the fact. <i>Ibid</i> .	
7. In fixing the ownership of stock, the declarations of the officers of the bank are inadmissible. I bid.	
8. Where a witness for the State has been detained from Court by the procurement of defendant, his previous examination, taken in writing, may be read in evidence. Williams vs. The State	402
9. The record of a judgment on notes, is no proof of the execution of the notes as against third persons. Feagan vs. Cureton	40 4
10. It is right in the Court not to require a Jury to regard a mere opinion of a witness. Banks vs. Gidrot & Co	421

INDEX.	649
11. To make testimony relevant, enough should be proven to show its applicability to the matter in issue. Tompkins vs. Williams	5 69 ,
See Interrogatories. Principal and Agent, 8.	
EXECUTION.	
1. The mere indorsement of "alias fi. fa." upon an execution, will not give that character to the process which, in all other respects, appears to be an original. Watts et al. vs. Smith	8
2. A sale and purchase by a plaintiff in fi. fa. under an enjoined fi. fa. conveys no title. Morris vs. Bradford.	5 27
See Levy. Limitation of Actions, 1. Sheriff.	
EXECUTORS.	
See Administrators, fc.	
FAILURE OF CONSIDERATION.	
See Pleading, 2, 3.	
FEES.	
See Sheriff, 3.	
FORMER RECOVERY.	
1. A recovery of land sued for under the Act "to simplify and curtail pleadings at Law," may be pleaded in bar of a subsequent action of ejectment. Sims vs.	

Smith...... 124

VOL. XIX-82

FRAUDULENT ASSIGNMENTS.

See Debtor and Creditor.

GIFT.

See Evidence, 1, 2.

GUARDIAN AND WARD.

See Devise and Legacy, 2.

HUSBAND AND WIFE.

- In such application, the Court may hear any sort of evidence, and its discretion will not be controlled unless flagrantly abused. Ibid.
- 3. The provision may extend back to the commencement of the suit. I bid.
- 4. On the trial, the defendant may plead and prove that the suit was brought without the knowledge or consent of the wife. Ibid.
 - 5. A bequest to K, in trust for the use of P, does not create a separate estate in P. Denson vs. Patton.... 577

INFANTS.

1. An infant may commit a fraud for which he is answerable, civiliter; but repudiating an agreement made during infancy, is not a legal fraud. Burns vs. Hill et al.	22
2. A fortiori, when the infants are not aware of their rights at the time of the agreement. Ibid.	
8. The fact that their parents are in straitened circumstances, and that the infants parted with their property to procure a home for their parents and themselves, does not constitute a sufficient consideration for the agreement to part with their property. Maintenance is due from parents to children, and not e converso. I bid.	
See Devise and Legacy, 2.	
INJUNCTION	
1. Will not be retained when the answer denies, positively, every equitable circumstance set up in the bill. Edmondson vs. Jones	19
2. Is granted, as a matter of course, to stay waste. Smith vs. The Mayor, &c	89
3. Will not be dissolved if answer is vague and unsatisfactory. Horn vs. Thomas	270
4. Or is a mere matter of opinion. Callaway vs. Jones.	277
5. Defendants may be called out of their county to argue a motion to dissolve an injunction. Semmes vs. The Mayor, &c	471

- 6. Injunctions granted ex parte under the 4th Equity rule, are granted on terms. 1 bid.
- 7. If there are several defendants, the injunction may be dissolved on the answer of the one against whom the equity is alleged. *Ibid*.
- 8. When the bill is amended, the Court may hear and decide a motion to dissolve before the amendment is answered. *I bid*.

INTEREST.

See Verdict, 3.

INTERROGATORIES.

- 2. It is no objection that a direct interrogatory has not been answered. *Ibid*.
- 4. If the order is improvidently granted, the party may refuse to answer until he can be heard. Ibid.

6. Where a witness, in cross-interrogatory, is asked to state who were present at a conversation inquired of in direct interrogatory, and he relates two conversations, but answers the cross-interrogatory only as to one: Held, that the testimony should be excluded. Ibid.	
7. The party's presence in the room is a good ground for excluding the commission. Holmes vs. Dobbins	629
JUDGMENT.	
1. All presumptions are in favor of the judgments of the Ordinary, in cases in which it has jurisdiction. Hansell vs. Bryan.	167
2. And of all Courts of competent jurisdiction. Jones vs. Tarver	278
3. The Dormant Judgment Act does not apply to judgments obtained before its passage. Ibid.	
4. The Superior Court may correct its order establishing a paper by the original, when found. Philips vs. Behn & Foster.	298
5. Where one advances money to take up a judgment, and takes a mortgage to secure him, the judgment is extinguished. <i>I bid</i> .	
6. Property alienated, pending an appeal, is liable to the judgment for damages for frivolous appeal. Ibid.	
7. A judgment is a lien on all property of defendant from its date. Ware vs. Jackson	452
.8. If there is a good, subsisting legal title in the defendant at the time of the judgment, the property is bound.	

Ibid.

9. The issuing of a ca. sa. is a sufficient act to keep a judgment from becoming dormant. Worthy vs. Low-ry	517
10. A discrepancy from the verdict which does not affect defendant's rights, is wholly immaterial. Mitchell vs. Printup	579
11. When a judgment is entered and not excepted to, the party cannot, at a subsequent term, move a different judgment nunc pro tunc. Printup vs. Mitchell.	586
See Amendment, 1. Estoppel, 1. Vendor and Purchaser, 2.	
JURISDICTION.	
1. When the Court gets jurisdiction of the person or property of a non-resident, it will administer justice to its own citizens, and will not send them to a foreign jurisdiction. Callaway vs. Jones and another	277
JURY.	
1. Trials before triors had best be public, but not necessarily. Epps vs. The State	102
2. If a Juror has been set down by mistake as disqualified, the mistake may be corrected. Ibid.	
3. Six month's residence in the county, is a necessary qualification for a Juror; but a challenge for this cause, must be taken before sworn. <i>Ibid</i> .	
4. A casual remark by a Juror to another person, in presence of Court, is no ground for new trial. <i>Ibid</i> .	
5. Proof by one witness of an expression of opinion by a Juror, is rebutted by the Juror's oath. Ibid.	

6. A correction of the Jury list by the Court, must be objected to at the time, and is no ground for new trial. Pressly (a slave) vs. The State	192
7. The fact that the Court reprimanded a Jury taken from the same list for a former verdict of acquittal, is no ground of error—there being no challenge of the array for that cause. Kelly vs. The State	425
8. In Selecting a Jury from the two pannels, the prisoner is entitled to seven strikes—he beginning and ending. I bid.	
9. Challenge for non-residence of Juror, must be made before sworn. Costley vs. The State	614
10. As to previously expressed opinion of Juror, Judge is trior; and the Supreme Court will not control his discretion. I bid.	
11. "Trial by Jury, as heretofore used," means only trial by Jury, as distinguished from other modes of trial. Ibid.	
LAND LAWS.	
1. A sale of a chance in the lottery of 1830 was valid. Dugas vs. Lawrence	55 T
LANDLORD AND TENANT.	
1. Where the tenant swears he is not the tenant or lessee of the person seeking to oust him, the latter must show a lease. Edmondson vs. White	5 34

LAPSE OF TIME.

See Adm'rs, &c. 1. Vendor and Pur. 2.

LEVY.

1. The Sheriff goes to levy a fi. fa. The defendant tells him to enter a levy on a negro not present, and gives the Sheriff a forthcoming bond, in obedience to which the negro was forthcoming: Held, that the levy and sale were good. Roebuck vs. Thornton	149
2. A mortgage debt should be credited with the value of property levied on by mortgage fi. fa. unless the levy is explained. Earnest vs. Napier and wife	537
LIEN.	
1. Paccepts a bill of exchange, under an agreement that certain property of the drawers in his hands shall be applied to the payment thereof: <i>Held</i> , that this agreement gave P a lien on the property to re-imburse himself, superior to that of an attachment subsequently levied. <i>Printup vs. Johnson</i>	73
2. The lien of millwrights extends only to the mill-site and such other land as is necessary for the working of the mill. Findlay vs. Roberts	163
8. The builder of a bridge for a company on the land of third persons, gets no lien on the land, nor does a judgment obtained by him. Powers vs. Armstrong	427
4. A carpenter being entitled to a claim of lien against the interest of one of several joint owners, asserted it against all: Held, that the claim was good against the one. Hillburn vs. O'Barr	591
See Constitutional Law, 8. Devise and Leg. 1.	

FNDEX.

LIMITATION OF ACTIONS.

1. A fi. fa. with the entries thereon, of a levy and sale of the land in dispute to one under whom the defendant claims, may be admitted as color of title. Color of title is any writing which serves to define the limits of the claim. Watts et al. vs. Smith.	8
2. A deed commenced by one Sheriff and finished by his successor, is color of title only from the date of the completion. <i>Ibid</i> .	
8. Color of title can be of service only in aid of possession; and possession may thus be matured into title, to the extent to which it is intended to gain possession. <i>Ibid</i> .	
4. Where A took possession of land, and afterwards left and went to another county with the intention of returning, which he did after the lapse of nearly a year: Held, that the Statute did not run in his favor during his absence, and only from his return. Byrne vs. Lowry	27
5. When the maker of a note, barred by the Statute, acknowledges the debt to be just and promises to pay it when he finished a church he was then building: Held, that the completion of the church was merely a time of payment and not a condition of payment. Eaton vs. Yarborough.	88
6. Possession under a deed from Central Bank, of lands belonging to Bank of Darien, is adverse possession. DeLorme vs. Pease	220
7. A succession of trespasses does not make continuous, adverse possession, unless there is some privity of vol xix-83	

4	2	Ľ	4	>
e	•	7	н	в

estate between the successive tenants, or the several titles are connected. Morrison vs. Hays	294
8. When possession is in subordination to the title of the true owner. <i>Ibid</i> .	
9. No adverse possession against an estate until represented. Miller vs. Surls	831
10. Possession, to give title, must be continuous and adverse. Holcombe vs. Austell	60 4
MACON.	
1. The Council have, under their charter, discretionary power to remove the marshal for specific causes. They cannot escape the consequences of their Act, by assuming to act in a judicial character. Shaw vs. The Mayor, &c	468
2. If improperly removed, they are bound to pay his salary for the whole year; but he cannot recover the money expended by him in defending the charges preferred. <i>I bid</i> .	
8. His damages are such as necessarily resulted from his amotion from office. 1bid.	
MANUMISSION.	
See Slaves, &c.	
MARRIAGE CONTRACT.	:
See Husband and Wife, 6.	

MORTGAGE.

1. A third person, who is not a party to the record, will

not be permitted to make objections to the foreclosure of a mortgage, under our Statute. Jackson vs. Stanford	15
See Deed, 2. Levy, 2.	
NEW TRIAL.	
1. The grounds for granting a new trial, should, in general, be something dehors the record. Bowie vs. The State	1
2. The mere statement of a fact as a ground for a new trial, as to the charge of the Court, is not sufficient evidence of the charge to justify a reviewing Court to grant a new trial thereon. Ibid.	
3. The mere omission of the Court to charge on a point of law, is not, in general, a sufficient ground for a new trial. The point should at least be one upon which the law is somewhat doubtful or abstruse. <i>Ibid</i> .	
4. A verdict, in accordance with the weight of evidence, will not be disturbed. Askew vs. Taylor	17
5. Where a verdict is rendered upon vague and unsatisfactory evidence, and it is apparent that better can be procured, a new trial will be granted, especially if the finding be against the weight of evidence. Fleming vs. Hammond	
6. Granted when verdict is without evidence. Mattox vs. Bryan	157
7. Granted when the Court, by its charge, excludes from the Jury one of the defendant's grounds of defence. White vs. Dinkins	285

case, to propound any questions to the witness which it may see fit. Epps vs. The State	102
2. The LXXIVth Common Law rule, restricting the power of the Judge in recalling a witness, transcends the powers of the Judges in making rules of practice. DeLorme vs. Pease	220
3. That a part of a fund in the Sheriff's hands is enjoined, is no reason why the balance should not be paid out. Philips vs. Behn & Foster	298
4. It is the right of Counsel to argue both the law and the facts to the Jury. Robinson vs. Adkins	398
5. It is the privilege of Counsel and duty of Courts to sift reluctant witnesses. Kelly vs. The State	425
6. When parties to a cause have made an agreement before the Court which is, in itself, legal, the Court should see to its bona fide execution. Johnson vs. Wright.	509
7. There is no limit to the discretion of the Court, in allowing testimony by way of rebuttal, &c. Tomp-kins vs. Williams	569
8. A party is not entitled to a supersedeas until his bill of exceptions is filed; yet, when irreparable mischief may result, the Court should give time for this purpose. Holcombe vs. Roberts	58 8
See Jury. Mortgage, 1.	
PRINCIPAL AND AGENT.	
T A Limited to the state of the	

1. A being stabbed, requested his brother B to employ Counsel to prosecute the offender, saying, that whether

he lived or died he should be paid. A died. Afterwards, B prosecuted the offender and paid \$175 therefor. In a suit by B against the administrator of A, to recover this amount: <i>Held</i> , that he co ^{-1,3} not recover, the agency being revoked by the dea of A. <i>Jones vs. Beall</i> .	171
2. The agency being once established, the principal is bound by the acts and sayings of agent in execution of contract. Coweta M. Co. vs. Rogers	417
8. The price which an agent to sell fixes on a commodity, is evidence against his principle, as to its value. Banks vs. Gidrot & Co	421.
PRINCIPAL AND SURETY.	
See Contract, 4, 6.	
PROCESS.	
1. Bearing test in the name of one of the Justices of the Inferior Court, is sufficient. Brown vs. Roberts & Foote.	424
QUO WARRANTO.	
1. The title to an office will not be tried when the term has expired, and no judgment of ouster can be pronounced. Morris vs. Underwood	559
RAIL ROADS.	
1. A R. R. Co. is bound to use ordinary care in running its trains, even if others are somewhat negligent; and hence, if damage results from this want of ordinary care on their part, they must make it good. The Central R. R. vs. Davis	437

4	•			ı	4	
4	'n	ч	н	Κ.	Λ	L

2.	If both parties are negligent, and the plaintiff, in the	
	exercise of common caution, could have avoided the	
	injury, he cannot recover of the company. The Ma-	
	con & W. R. R. vs. Winn	440

REGISTRY.

See Deed, 1, 3.

REMAINDER.

See Devise and Legacy, 1.

RIGHT OF WAY.

See Easement, 1.

SERVICE.

- The Statute does not prescribe any form for Sheriff's return of service; and if it does not appear to be illegal, it will be presumed to be legal. Jones and another vs. Tarver.

SET-OFF.

See Equity, 2.

SHERIFF.

1. It is no protection to a Sheriff that he acted under the authority of the agent of the original plaintiff in f. fa. when it appeared that the f. fa. had been trans-

	INDEX.	001
	other—a fact known to the Sheriff. G	re- 71
name of a post that time will not be p	erroneously dated, so as to bear teste in the erson who was not the Judge of the Coup, is not void, but irregular; and a She protected who refuses to execute it. Judgeterfield.	ur t riff or-
sales alone :	of 1792 does not look to the amount as the measure of the Sheriff's compensions. Rose	8a-
sa. that he h	cuse for not arresting a defendant in a cuse been already arrested and given both vs. Pierce	n d,
	t a breach of official duty is a breach of ad. Collier vs. Stoddard	
to make any receive from	selling under sundry f. fas. has no rig agreement with some of the plaintiffs them any thing else than cash. Phil Foster.	to ips
See Claims, 1.	•	•
•	SHERIFF'S DEED.	
See Lim. of A	letions, 2.	
	SLANDER.	
See Pleading,	4.	
SLAVES	AND FREE PERSONS OF COLO	R.
the humanit Georgia."	umits certain slaves, "if compatible wy, &c. of the authorities of the State if not compatible, it directed the execute a out of the State of Georgia, to such plants	of ors

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as they may select; and "that the whole proceeding

be conducted according to the laws and decisions of the State of Georgia;" and providing a forfeiture against such heirs as attempted to interfere with this provision: <i>Held</i> , 1st. That it was the intention of the testator for the slaves to be set free and remain in Georgia, provided the consent of the Legislature could be obtained; otherwise, they were to be removed beyond the limits of the State. 2d. That such a provision is not inconsistent with the laws and policy of this	
State. Cleland et al. vs. Waters	5.
2. W W, a free person of color died, leaving a tract of land in the occupancy of M, a free person of color, as his wife. S W, who was also a free person of color, claimed the land as the sister of W W and sued M for it: Held, that she was not entitled to recover the land of M. Akin vs. Anderson	19
8. If a gift of slaves be coupled with a provision that every tenth of the future increase be emancipated, the condition is void. Smith vs. Dunwoody et al 28	38
SURETY.	
See Contract, 4, 6.	
TAX AND TAX RECEIVERS.	
1. Receiver is entitled to no commission on County Tax. The Inf. Ct. vs. Yoakum	11
TROVER.	
1. The defendant cannot deliver a part of the property recovered and pay for the balance. He must deliver all or pay all. Mitchell vs. Printup	79
TRUSTS AND TRUSTEES.	
1. A trustee may sell the property of his cestui que	

	estate: A fortiori, may such sale be ordered by a Court of Chancery, where the cestui que trusts are in- fants. White vs. Dinkins
	See Administrators, Executors, 1. Devise and Legacy, 1. Husband and Wife, 5.
	USE AND OCCUPATION.
# # * *	1. Action for use and occupation, does not lie where defendant claims adversely. Williams vs. Hollis
ıf	See Costs.
13	· USURY.
ir, for ind	1. An agreement to let one receive rent of land to secure usurious interest, is void. White vs. Ault 551
5	VENDOR AND PURCHASER.
iss the	1. When several lots are sold by number, and in the bond for titles, one is twice inserted and another is omitted, Equity will not restrain the collection of the purchase money, when the vendor admits the error and is ready to execute a conveyance for the lots sold. Convers vs. Hamilton
Tir.	2. A bona fide purchaser under a mortgage, will be protected after thirty years acquiescence, notwithstanding some irregularity in foreclosure. DeLorme vs. Pease
्राप्त ्राप्त 	3. A contract for land will not be vitiated by a false assertion of the vendor, as to quality and value, where the buyer has full opportunity of forming a correct judgment; especially where the rescission is not applied for within a reasonable time. Tindall vs. Harkinson
. 1 ⁶⁸ - 1	See Administrators. Executors, 1. Devise and Leg. 1.

VERDICT

·	
1. For principal "and interest," means the interest claimed in the petition. Philips vs. Behn & Foster.	298
2. May be corrected in mere matter of form after the Jury are dispersed. Feagan vs. Cureton	404
8. A vardict for a liquidated demand should bear interest. Earnest vs. Napier and Wife	537
WASTE.	
See Injunction, 2.	
WAY.	
See Easement, 1.	
WARRANTY.	
1. A general warranty of soundness may cover patent defects. Callaway vs. Jones, &c	277
WESTERN & ATLANTIC RAIL ROAD.	
1. A rejection by the late engineer, does not authorize a suit under the Act of 1851-'2, against the present superintendent. Mason vs. Cooper	543
WITNESS.	
1. Party to the record may be a witness where he has no interest in the event of the suit. The Central R. R. & Co. vs. Hines, Perkins & Co	203
2. A witness is competent if his interest is against the party calling him. Earnest vs. Napier and Wife	537
See Practice, 4.	





